83-2050

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ALEXANDER L. STEVAS

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PACIFIC POWER & LIGHT COMPANY,
PETITIONER,

V.

PUBLIC SERVICE COMMISSION OF WYOMING,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE WYOMING
SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a state constitutionally deny any and all compensation for investments prudently made by a regulated public utility to meet its statutory duty to provide adequate electric service?

2. Is a procedural prerequisite to compensation for such investments, created by a state court ten years after the fact, which is applied to preclude a decision on the merits (a) consonant with procedural due process requirements or (b) a state ground sufficiently independent and adequate to prevent review of Petitioner's constitutional claims?

PARTIES

Petitioner Pacific Power & Light Company[1] provides electric service as a

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[1] Petitioner Pacific Power & Light Company is a Maine corporation and owns portions of the following subsidiaries and affiliates: Northwest Energy
(Footnote continued)

regulated public utility in Wyoming. Respondent Public Service Commission of Wyoming is the state agency in

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(Footnote 1 continued from previous page) Services Co., NORNEV Demonstration Geothermal Co. and Pacific Northwest Power Co.

In addition, Petitoner has two wholly owned subsidiaries, Pacific Telecom, Inc. and NERCO, Inc., which in turn own portions of the following subsidiaries and affiliates: Associated P&C Engineers, Inc.; AT&E Corp.; Cid Communications, Limitada; Comdial Corp.; Evotek; Eyedentify; Flight Dynamics, Inc.; Interion Telephone Co.; Multivisions, Inc.; Multivisions, Ltd.; STU Partnership; TelCom Construction Co.; AKRG Joint Venture; Alligator Ridge Joint Venture; Bonnifield/Dry Creek Project; Bridger Coal Co.; Candelaria Partners; Clements Energy Associates; Clements Energy 1979-I; Clements Energy 1979-II; Clements Energy 1980; Clements Energy 1981; Clements Energy 1982-I; Clements Energy 1982-II; Decker Coal Co.; Ketchum Creek Joint Venture; Montana Royalty Company, Ltd.; Prince of Wales Project; Rampart Joint Venture; Ruby Joint Venture; Teton Nuclear Exploration; Texas Eastern-Lo Project and Unga Joint Venture.

Wyoming with the duty to regulate public utilities.[2]

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[2] The decision of the Wyoming Supreme Court consolidated four separate appeals from three different dockets originally before the Respondent, Public Service Commission of Wyoming. Hearings were consolidated at both the commission and appellate levels. However, the other three appeals were decided by the Wyoming Supreme Court on different grounds and, therefore, the remaining appellants before that court were not included as parties in this petition.

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REPORTS OF OPINIONS AT ISSUE

The decision of the Wyoming Supreme Court is reported at 677 P2d 799 (Wyo 1983). It is reprinted in the Appendix at 1, followed by the court's Order Denying Rehearing at 73. The underlying Memorandum Opinion and Final Order of the Public Service Commission of Wyoming in Docket No. 9454 Sub 17 (Dec. 2, 1982) is reprinted in the Appendix at 75.[3]

GROUNDS FOR JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 USC § 1257(3) to review the decision of the Wyoming Supreme Court issued February 7, 1984, which became

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[3] The District Court of the First Judicial District of Laramie County affirmed Respondent's order without independent review. Order Denying Motions for Briefing and Affirming the Order of the Public Service Commission of Wyoming, Docket No. 100-92 (Wyo Dist Ct Mar. 2, 1983).

final upon entry March 8, 1984 of the Order Denying Rehearing by the Wyoming Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment to the United States Constitution states, in pertinent part, as follows:

> No person shall be *** deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment to the United States Constitution provides as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

3. Wyoming Statutes § 37-3-112 provides as follows:

> The service and facilities of every public utility shall be adequate and safe and every service regulation shall be just and reasonable.

STATEMENT OF THE CASE

A. Statement Including Material Facts

Most, if not all, states have statutes requiring public utilities to provide safe and adequate service to meet the present and future needs of their customers. Wyoming is no exception. Wyo Stat § 37-3-112, supra. As the Wyoming Supreme Court acknowledged in this case: "It should also be noted that utilities are under a statutory duty to provide service that is adequate and safe. Section 37-3-112, W.S. 1977. This may carry with it the obligation to take some action to ensure future supplies." App. at 32.[1]

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[1] References to the separately bound appendix to this petition will (Footnote continued)

In order to fulfill their duty to serve, electric utilities prepare forecasts of growth in public demand for electricity over the period necessary to design and construct any new facilities that may be required. During the ten years or so needed to design, site, license and construct a major generating facility, such as a nuclear power plant, conditions materially different from those predicted may develop and dictate that a particular construction project be abandoned. This is the situation Petitioner faced with respect to the two nuclear projects involved in this case.

By the late 1960s, it was acknowledged that Petitioner and the Pacific Northwest region generally faced a

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(Footnote 4 continued from previous page) appear as "App. at" followed by appropriate page citations.

serious projected energy shortage (Tr. 461-62). As a result, Petitioner and other Northwest utilities developed a construction and acquisition program to meet their projected needs for generating capacity. Both the Pebble Springs Project and the Washington Public Power Supply System Project No. 5 ("WNP-5"), the two nuclear plants at issue here, were a part of this program.

Petitioner became a minority owner in Pebble Springs by accepting participation in October 1974 and signing an owner's agreement in January 1976 (Tr. 668-69). Petitioner began booking its costs for this project in May 1975 (Ex.7, Table 7-3). Similarly, Petitioner became a 10% owner of WNP-5 by accepting participation in March 1975 and signing an owner's agreement in July 1976 (Tr. 678). Petitioner began booking costs on WNP-5 in May 1976 (Ex. 7, Table 7-4).

Because of changed conditions beyond Petitioner's control, both Pebble Springs and WNP-5 were canceled by their sponsors (Tr. 474-79). Petitioner's direct investment in the two projects as of December 1981 was $182 million, of which $31.9 million is allocated to Petitioner's Wyoming operations. (Ex. 7, Tables 7-1, 7-2; Ex. 12, Tables 12-3, 12-5). Petitioner's combined after-tax investment was estimated at $129 million, of which $20.5 million is allocated to Petitioner's Wyoming operations (Tr. 543; Ex. 12, Tables 12-3, 12-5).

Respondent denied Petitioner recovery of any portion of its investments without regard to whether they were prudent. That action was affirmed by the Wyoming Supreme Court on a novel ground not advanced by Respondent or any other party. Thus, the first question presented by this petition is whether a

state can constitutionally deny a regulated electric utility all compensation for funds invested prudently, in the ordinary course of its business and in fulfillment of its statutory duty to serve, in a generating project later abandoned due to unforeseen circumstances.

The Fifth Amendment of the United States Constitution prohibits the taking of private property without just compensation. This prohibition is applied to the states through the Fourteenth Amendment. This Court has applied this concept many times to the regulation of public utilities and made clear that unreasonable regulation by state utility commissions can result in the taking of utility property without just compensation. See, e.g., Los Angeles Gas & Elec. Corp. v. R.R. Comm'n, 289 US 287, 53 S Ct 637, 77 L Ed 1180 (1933); McCardle v.

Indianapolis Water Co., 272 US 400, 47 S Ct 144, 71 L Ed 316 (1926); Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n, 262 US 679, 43 S Ct 675, 67 L Ed 1176 (1923).

In Fed. Power Comm'n v. Hope Natural Gas Co., 320 US 591, 64 S Ct 281, 88 L Ed 333 (1944), the Court interpreted the requirement of "just and reasonable" rates in the Natural Gas Act to require a balancing of consumers' and investors' interests:

> The rate-making process under the Act, i.e., the fixing of "just and reasonable" rates, involves a balancing of the investor and consumer interests. *** From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. 320 US at 603, 64 S Ct at 288, 88 L Ed at 345. (Citations omitted and emphasis added.)

In Permian Basin Area Rate Cases, 390 US 747, 88 S Ct 1344, 20 L Ed 2d 312

(1968), this Court clarified its position in Hope and found that "the just and reasonable standard of the Natural Gas Act 'coincides' with the applicable constitutional standards." 390 US at 770, 88 S Ct at 1361, 20 L Ed 2d at 338.

As a general rule, just and reasonable rates allow recovery by the utility of prudent expenditures. Justice Cardozo observed for the Court in West Ohio Gas Co. v. Pub. Util. Comm'n, 294 US 63, 55 S Ct 316, 79 L Ed 761 (1935), that:

> A public utility will not be permitted to include negligent or wasteful losses among its operating charges. The waste or negligence, however, must be established by evidence of one kind or another, either direct or circumstantial. 294 US at 68, 55 S Ct at 319, 79 L Ed at 767. (Emphasis added.)

Because of the approach taken by Respondent and by the Wyoming Supreme

Court, Petitioner has received no compensation, let alone just compensation, for its investment in the two projects.

The second question presented by the petition is whether a constitutional right to just compensation can be thwarted by a procedural prerequisite articulated by a state court for the first time ten years after the time for satisfying that step had expired. In its order in this case, the Wyoming Supreme Court held that under state law expenditures of this type could properly be recoverable through rates, but went on to create a procedural hurdle to bar recovery in this instance. Thus, the court stated a new rule: "if the utility wishes to involve the consumer in a loss or cost resulting from failure of the project, i.e., if it wishes to have such cost or loss considered in subsequent rates, [the commission's] prior approval

is necessary." App. at 42-43. The court went on to define "prior approval" as "if the consideration, and only if the consideration is given before the investment is made or agreed to be made." App. at 44. In the case of both Pebble Springs and WNP-5, the investment was made or agreed to be made in the mid-1970s.

A fundamental requisite of due process is the opportunity to be heard. Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 70 S Ct 652, 94 L Ed 865 (1950). Further, the hearing must be meaningful. Bell v. Burson, 402 US 535, 91 S Ct 1586, 29 L Ed 2d 90. Neither the Respondent nor the Wyoming Supreme Court addressed Petitioner's prudence, which was fully developed on the record, or at any stage attempted to balance the interests of Petitioner's consumers and investors. Petitioner here has been denied due process from the absence of a

decision based on the record. As stated by the Court:

> It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision does not meet this standard. Bell v. Burson, 402 US at 542, 91 S Ct at 1591.

This Court has consistently held that state court judgments will not be reviewed if they are based on adequate and independent state grounds. That principle, however, does not permit state courts to insulate their decisions from federal constitutional review on the basis of insubstantial state grounds. Demorest v. City Bank Farmers Trust Co., 321 US 236, 64 S Ct 384, 88 L Ed 526 (1944). Thus, this Court has said:

> It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support. Of couse, if nonfederal

> grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided. **** But the qualification is a material one and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof. Ward v. Bd. of Comm'rs, 253 US 17, 22-23, 40 S Ct 419, 421 (1920). (Citations omitted).

NAACP v. Alabama, 357 US 449, 78 S Ct 1163, 2 L Ed 2d 1488 (1958); Household Telegraph Cable Co. v. Newport, 247 US 464, 38 S Ct 566, 62 L Ed 1215 (1918); Rogers v. Alabama, 192 US 226, 24 S Ct 257, 48 L Ed 417 (1904).

The Wyoming Supreme Court rule in this case is neither adequate nor independent:

(1) The Wyoming Supreme Court admitted that "the foregoing statutes and rule do not require [commission] approval for PP&L's part ownership of the terminated projects" and "The utility need not

consult [the commission] before embanking (sic) on the project." App. at 40, 42. Further, the court cited no statute that empowers the Respondent to grant the suggested approval. Justice Rose, in his concurrence, stated that even if Petitioner had asked for approval in 1975, the Respondent would have been without power to grant such approval. App. at 56-57.

(2) That the new rule is a creation of the court is also apparent from the detailed approval now required by the court with a complete absence of statutory support. Thus, the court stated:

> [T]he risk attributable to the consumers can be evaluated and be either rejected or accepted--or, perhaps, the proportion of the risk to be borne by the consumers, if unsuccessful, can be set. The conversion computations to a used and useful property, if successful, and the period of amortization, if unsuccessful and such becomes necessary, can be

> predetermined. The percentage of the investment attributable to the Wyoming operation can be ascertained. All to be done before the fact of success or failure is known. App. at 44-45.

(3) In this and parallel circumstances, recovery has been allowed in Wyoming without requiring explicit commission approval prior to the request for rate recovery, let alone requiring the list of specific findings enumerated by the Wyoming Supreme Court in its order. Thus, the Respondent allowed recovery of Petitioner's costs related to the High Mountain Sheep Project. High Mountain Sheep was a proposed hydro project on the Snake River which was abandoned in 1975 and which never produced any electricity. However, Respondent allowed amortization of the associated costs over a five-year period (Tr. 862-63). Further, Respondent has allowed recovery of gas exploration,

drilling and development costs previously. Northern Gas Co., 25 PUR4th 317 (Wyo PSC 1978); Northern Utilities, Inc., 25 PUR4th 365 (Wyo PSC 1978).

In reference to these cases, the Wyoming Supreme Court stated that "Usually the activity which subsequently failed was approved as an activity prior to its inception." App. at 43. There is no indication in any prior case that prior approval existed or that such approval was material to the commission's decision. The rule announced by this Court in NAACP v. Alabama, supra, applies:

> [S]uch a local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures to obtain appellate review, cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon

> prior decisions, seek vindication in state courts of their federal constitutional rights. 357 US at 457-58, 78 S Ct at 1169, 2 L Ed 2d at 1497.

(4) The sole rationale given by the Wyoming Supreme Court for its new rule of prior approval is meritless. The court stated that "The requirement for prior approval of the [commission] is necessary so that the risk attributable to the consumers can be evaluated and be either rejected or accepted." App. at 44-45. (Emphasis added.) Nowhere does the court explain why the interests of consumers and investors cannot be -balanced equally well, if not better, after the conclusion of a given project - either at operation or abandonment. In the four-day hearing before Respondent, Petitioner presented the testimony of nine witnesses. The staff of the Public Service Commission, which adopts an adversarial role at the hearing (Rules of the Public Service

Commission of Wyoming § 103c (1979)), presented two witnesses contesting various parts of Petitioner's case. Thus, Petitioner's reasons for commencing, continuing and abandoning both projects were fully developed. Had it been claimed that material information was unavailable or that an adequate review could not be performed, Respondent could simply have weighed the evidence and found the Petitioner had not sustained its burden of proof. Contrary to the Wyoming Supreme Court statement, there is no need for prior approval in order to evaluate the risk attributable to consumers.

(5) At no stage did any party argue or even suggest the existence of the procedural rule the court used to dispose of this case. This is additional evidence

that the rule was developed to deny Petitioner compensation, rather than to enforce pre-existing standards.

In conclusion, it is an unconstitutional taking of private property without just compensation for the state, on the one hand, to require an investment to be made to provide adequate electric utility service and, on the other, to deny all compensation without examining the prudence of the investment or weighing the interests of both consumers and investors. Further, the court's creation of a procedural prerequisite after the fact to bar all compensation cannot preclude Petitioner from its right to a determination on its constitutional claim.

B. Stage At Which Federal Question Was Raised

Petitioner raised its constitutional claims at every level of the proceedings in this case. During the evidentiary hearing before the Wyoming Public Service Commission, counsel for the staff of the commission moved to strike the testimony of two of Petitioner's witnesses (Tr. 859). Petitioner's counsel had argued in support of its constitutional claims that the testimony would establish confiscation if all recovery was denied (Tr. 856-57). The commission denied the motion to strike (Tr. 859).

Pages 49-53 of Petitioner's brief before the commission specifically cited both the Fifth and Fourteenth Amendments to the United States Constitution in arguing that a complete denial of compensation would result in a taking of private property without just

compensation. The commission's order made no mention of Petitioner's constitutional claims.

Petitioner reaffirmed its constitutional law claims in its Petition for Review in the District Court of the First Judicial District for Laramie County, Wyoming. The following appeared in that petition:

> 12. ***Further, by denying Pacific the right to recover such expenditures, the Commission has reduced Pacific's rate of return to a confiscatory level and has taken its property without due process of law in violation of *** the Fifth and Fourteenth Amendments to the United States Constitution *** .
>
> 13. The Order is unlawful and should be set aside because it is:
>
> * * * * *
>
> b. Contrary to Pacific's constitutional rights, as set forth above.

The District Court affirmed the commission's order without independent review.

Petitioner once again squarely presented the issue in its Docketing Statement before the Wyoming Supreme Court, both in its statement of the case and in the questions presented:

> Furthermore, if no compensation is allowed in this case, Pacific's right to due process under the Wyoming Constitution is denied and its property is taken without just compensation in violation of both the Wyoming and United States Constitutions. US Const Amend V, XIV (Docketing Statement pp. 3-4).
>
> 4. Does a denial of any recovery in this instance force an unconstitutional taking of Pacific's property without just compensation or due process? (Docketing Statement at 4.)

These issues were argued before the Wyoming Supreme Court in Petitioner's opening brief at pages 1, 10-11, 32-33 and in Petitioner's reply brief at pages 13-23.

None of Petitioner's arguments were addressed in the order of the Wyoming Supreme Court, although the concurring opinion expressed a concern that the procedure adopted by the majority might be constitutionally infirm.

App. at 56-57.

REASONS FOR ALLOWING THE WRIT

A. Given the Magnitude and Multitude Nationally of Projects Facing or Likely to Face Abandonment, the Question Presented Is of Wide Import.

This petition presents an issue which is part of a nationwide phenomenon. Many generating projects, particularly nuclear projects, have been terminated by public and private utilities and the majority of state regulatory commissions have been required to address the ratemaking treatment to be given the associated costs. The phenomenon is of sufficient significance that the United

States Department of Energy ("DOE") published a study in April 1983 entitled "Nuclear Plant Cancellations: Causes, Costs, and Consequences." Energy Information Administration, US Dep't of Energy, DOE/EIA-0392 (April 1983). The DOE study revealed that, by the end of 1982, 100 nuclear units had been canceled by public and private utilities. Id. at x. These canceled projects represent almost half of the nuclear capacity ordered by the electric utility industry since the inception of commercial nuclear power. Id. at ix. Further, the study estimated that future abandonments of projects vulnerable to cancellation would involve total investment ranging from $4.5 to $8.1 billion, or approximately equal the combined costs of all previous major cancellations. Id. at 65, 69.

As identified by the DOE, financial difficulties were frequently the cause or a significant part of the cause of abandonment. Id. at 17-25. The attempt by a utility already strapped for funds to absorb an additional multimillion dollar loss can be crippling. Thus, the Ohio commission allowed an emergency rate increase of $90 million for Ohio Edison Company within a month of the Ohio Supreme Court denial of amortization and as a direct recognition of the impact of that decision on the utility's financial health. Ohio Edison Co., Case No. 81-898-EL-AEM (Ohio PUC July 31, 1981). App. at 135.

Petitioner is aware of at least 125 cases decided by state regulatory bodies and the Federal Energy Regulatory Commission which have addressed the issue of the ratemaking treatment to be given costs associated with abandoned

generating projects, both nuclear and other.[5] By far the typical ratemaking treatment has been to determine the prudence of the utility and then balance the interests of consumers and investors, splitting the cost responsibility between them. See e.g., Union Elec. Co. v. FERC, 668 F2d 389, 397-98 (8th Cir 1981).

There has been, however, an increasing trend in recent years for commission staffs and intervenors to argue that some aspect of state law prohibits the granting of recovery, even in the absence of a finding of imprudence. The constitutionality of such arguments has been raised and is presently pending before state courts in Missouri, Montana, New Hampshire, Oregon and Washington.

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[5] A listing of these cases by jurisdiction was appended to Petitioner's briefs both before the Wyoming Supreme Court and before Respondent.

Missouri v. Pub. Serv. Comm'n, Case No. CV 183-1064cc (Mo Cir Ct April 16, 1984); Pacific Power & Light Co., 53 PUR4th 24 (Mont PSC 1983); Pub. Serv. Co. of New Hampshire, DR 83-398 (NH PUC March 9, 1984); Portland General Electric Co., UM 13, Order No. 83-879 (Or PUC Dec. 27, 1983); Washington Util. & Transp. Comm'n v. Puget Sound Power & Light Co., 54 PUR4th 480 (Wash UTC 1983); Washington Util. & Transp. Comm'n v. Pacific Power & Light Co., 51 PUR4th 158 (Wash UTC 1983).

Given this trend toward complete denial of compensation - the first case to result in complete denial known to Petitioner occurred as recently as 1979 (Pacific Power & Light Co., Order No. 79-754 (Or PUC Oct. 29, 1979)) - and the magnitude and multitude nationally of projects still vulnerable to cancellation, the present resolution of the issue would be timely.

B. State Courts Addressing This Issue Have Disagreed on its Resolution.

The most well-known case nationally of a state supreme court's denial of direct amortization of an investment in a later-abandoned project is Office of Consumers' Counsel v. Pub. Util. Comm'n, 67 Ohio St 2d 153, 423 NE2d 820 (1981). There, in a case involving Cleveland Electric Illuminating Company, the Ohio Supreme Court held for the first time that state law prohibited direct compensation for abandoned generating projects. The constitutional issue was not dealt with by the court until its decision in Dayton Power & Light Co. v. Pub. Util. Comm'n, 4 Ohio St 3d 91, 447 NE2d 733 (1983). There the court found no taking had occurred.

Cleveland Electric Illuminating continued to pursue its remedies in Ohio and twice appealed decisions of the state supreme court to this Court, both of which were dismissed for lack of a properly presented federal question. 455 US 914, 102 S Ct 1267, 71 L Ed 2d 455 (1982); ___ US ___, 103 S Ct 712, 74 L Ed 2d 943 (1983). By the time Cleveland Electric Illuminating appealed to this Court for the third time, the Ohio commission had increased the company's allowed rate of return to compensate the company for the increased risk its investors had to bear because of the denial of direct amortization. Cleveland Elec. Illuminating Co., 46 PUR4th 63 (Ohio PUC 1982). This time, this Court denied Cleveland Electric Illuminating's appeal for want of a substantial federal question. ___ US ___, 104 S Ct 47, 78 L Ed 2d 68 (1983).

In Petitioner's case today there has been no compensation, either directly through amortization or indirectly through an increased allowed rate of return. Similarly, the Missouri commission gave no compensation in an identical situation to Union Electric Company. 57 PUR4th 169 (Mo PSC 1983). Nevertheless, the Missouri Circuit Court found, simply citing without discussion this Court's denial in the Cleveland Electric Illuminating case for want of a substantial federal question, that complete denial was not an unconstitutional taking of private property without just compensation. Missouri v. Pub. Serv. Comm'n, Case No. CV 183-1064cc (Mo Cir Ct April 16, 1984). App. at 126. This case is presently before the Missouri Supreme Court.

The Court of Appeals for District III in Wisconsin made a similar finding in a case involving the Wisconsin Public Service Corporation, i.e., that the complete denial of recovery of costs associated with an abandoned project "does not confiscate utility property." Wisconsin Pub. Serv. Corp. v. Pub. Serv. Comm'n, No. 79-1929 (Wis Ct App Dec. 22, 1981). App. at 170. That decision was reversed by the Wisconsin Supreme Court, allowing the utility to recover some of its costs. Wisconsin Pub. Serv. Corp. v. Pub. Serv. Comm'n, 109 Wis 2d 256, 325 NW2d 867 (1982). In reversing the court of appeals, the Wisconsin Supreme Court applied an "arbitrary or capricious" review standard to the commission's initial decision denying compensation. However, the court's final conclusion was that "Since the commission's accounting treatment prevented the recovery of

$7.5 million from ratepayers, future rates would necessarily be unjust and unreasonable." Id. at 871. As noted above, the just and reasonable standard has been held to coincide with applicable constitutional standards.

In short, the state courts have varied substantially in their application of federal standards to this issue. The issue will recur in the future given the factors which have recently required the abandonment of many nuclear and other generating facilities. This is a compelling reason for granting certiorari.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Court to issue a writ of certiorari to and reverse the decision of the Wyoming Supreme Court. The case then should be remanded for compliance with Fed. Power Comm'n v. Hope Natural Gas Co. and West Ohio Gas

Co. v. Pub. Util. Comm'n by requiring Petitioner's prudence with respect to these projects to be reviewed and the interests of both Petitioner's consumers and investors to be weighed.

Respectfully submitted,

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CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PACIFIC POWER & LIGHT COMPANY,
PETITIONER,

V.

PUBLIC SERVICE COMMISSION OF WYOMING,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE WYOMING
SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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PACIFIC POWER & LIGHT COMPANY, a corporation, Appellant (Petitioner),

v.

The PUBLIC SERVICE COMMISSION OF WYOMING, Appellee (Respondent).

LOWER VALLEY POWER & LIGHT INC., Appellant (Petitioner),

v.

The PUBLIC SERVICE COMMISSION OF WYOMING, Appellee (Respondent).

CHEMICAL BANK, a New York corporation, Appellant (Petitioner),

v.

The PUBLIC SERVICE COMMISSION OF WYOMING, Appellee (Respondent).

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, Appellant (Petitioner),

v.

The PUBLIC SERVICE COMMISSION OF WYOMING, Appellee (Respondent).

Nos. 83-75 to 83-78

Supreme Court of Wyoming.

Feb. 7, 1984

Rehearing Denied March 8, 1984 in No. 83-75

Before ROONEY, C. J., and THOMAS, ROSE, BROWN and CARDINE, JJ. ROONEY, Chief Justice.

This is an appeal from a district court ruling affirming an order of the Wyoming Public Service Commission (PSC) which denied appellants the right to recover in rates any and all investments, expenses or obligations related to three abandoned nuclear power construction projects.

We hold the matter to be moot as to all appellants except Pacific

Power & Light Company (PP&L), and we affirm the decision of appellee insofar as it pertains to PP&L.

There are four appellants. Appellant Lower Valley Power and Light, Inc. (LV) is a distribution level electric cooperative. Appellant PP&L is a publicly held corporation providing electric service as a regulated public utility. Both LV and PP&L are electric public utilities within the regulatory jurisdiction of the Wyoming PSC. Appellant Washington Public Power Supply System (WPPSS) is a joint operating agency which builds, owns and operates electric generation and transmission facilities and sells electric power to its members

and others. Appellant Chemical Bank (CB) is a New York corporation which is a bond-fund trustee.

LV and Fall River (FR), another distribution level electric cooperative which is not a party to this appeal, along with 86 other electric utility cooperatives, municipalities, and public utility districts, each signed, on July 14, 1976, identical Participants' Agreements (Agreements) which entitled them to a percentage share of power from two nuclear power projects (WNP-4 and WNP-5) which WPPSS was constructing in the state of Washington and which obligated them each to pay a proportion of the costs of said projects "whether or not" the projects were ever completed. PP&L was a 10% owner of WNP-5, and also

was participating in another nuclear power project known as Pebble Springs. WPPSS financed its ownership shares of WNP-4 and WNP-5 through the sale of municipal tax exempt bonds. CB is the bond-fund trustee for said bonds.

The Agreements executed by LV and FR were not submitted to the PSC for review or approval prior to their execution, or at any time subsequent.

Construction of WNP-4 and WNP-5 was begun in 1976 and abandoned in 1981, when WNP-4 was 16% complete and WNP-5 was 20% complete. The Pebble Springs project was terminated in 1982, with no construction ever being done, but with over $200 million invested in site preparation. No electric power will ever be generated by any of these three power plant projects.

The controversy was initiated by the PSC under its investigative powers pursuant to § 37-2-117, W.S. 1977[1] through a "Notice and Order Setting Hearing" made and entered on April 22, 1982 and directed to LV, PP&L and FR. The Commission Staff had previously petitioned the Commission to investigate the matter as to LV. Of course, the

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[1] Section 37-2-117 provides:

> "Whenever the commission shall believe that an investigation of any act or omission to act, accomplished or proposed, or an investigation of any rate, service, facility or service regulation of any public utility should be made in order to secure compliance with the provisions of this act and orders of the commission, it may of its own motion summarily investigate the same."

Commission could institute the investigation without such petition "summarily" and "of its own motion." It did so with its "Notice and Order Setting Hearing." The record amply reflects the waiver of any defect or objection in and to the investigation by PP&L. The scope of the investigation was also explored and understood by the parties, and the hearing proceeded on the issue of whether or not the investment, expenses and obligations incurred by PP&L and LV in the projects could be properly considered in fixing the rate base for their operation, and it did not proceed on the issue of what the rates should be, i.e., a rate case.

The transcript reflects that all parties recognized the correct issue

and that it would be pertinent to rates and the procedure and evidence would be similar to that of a rate case. The following occurred prior to the testimony of the first PP&L witness:

> "MR. ROGERS [Representing PSC Staff]: *** I do have one additional matter.
>
> "CHAIRMAN SMYTH: Yes.
>
> "MR. ROGERS: And that is concerning the filing by the company made on July 2, 1982, pursuant to the commission's order. The commission will recall that these matters were originally set for hearing on July 16th of 1982, pursuant to the commission order of April 22, 1982.
>
> "Upon the motion of the staff the hearings were continued until this week, and that was made pursuant to the commission's order of May 28, 1982. And contained within that order was a provision that all testimony by all parties was to be filed on or before July 2, 1982.

"Now, I don't know if the commission is aware, but as part of the company's filing on July 2, on or about July 2, they filed tariffs, and those tariffs contain a request for a change of rates in amounts variously set at $5,743,000, or $10,967,000. It was the staff's understanding at the beginning that this was to be a generic matter, that it was not to be a rate matter. The filing made by the company has changed that to a contested case.

"And the staff has concerns regarding the notice requirement of the Administrative Procedures Act, with regard to this matter. I am sure that the commission will recall its own rulings, that a rate making matter is a contested matter under the act, and the commission, or the act is very specific with regard to the notice required.

"And I think that this matter should be resolved by the commission in some way. I have broached the matter with Mr. Girard, and we are attempting to come up with some type of a solution to the problem,

but I think that the commission should be made aware of it prior to the beginning of this testimony.

"CHAIRMAN SMYTH: Mr. Girard, do you wish to respond to that?

"MR. GIRARD: Very briefly. Mr. Rogers is correct, he made me aware of this matter, I think it was five or six minutes before the hearing commenced this afternoon, so he and I didn't really have time to have a calm lawyer-like discussion of the problem. He agreed to raise it to bring it to your attention. The only thing I will say is this: The purpose of the generic proceeding, I believe, was to determine how to deal with the costs of the nuclear plants at issue.

"And the question the company had was: The generic proceeding presumably will consider how much was spent, why was it spent, was it reasonable, who bears the risk of that and so forth. And let us assume just for discussion, that the commission considered all that, and after deliberating said, 'We think the total

costs that should be borne by ratepayers are, say, $10 million a year for five years.'

"Then the question would get to be, 'What would then happen?' Presumably, if the company hadn't filed rates it could then file rates designed to achieve the level of revenues found appropriate by the commission. And we would then wonder, would we have a rate case in which every issue would be open again, and we would then retry the question of who should pay for the nuclear plants.

"We figured that the commission likely didn't want to do that, that this is the hearing to find out how that expenditure is going to be dealt with. There may be a question as to exactly how the--which particular ratepayer should pay for it, but we would think that there should be one time and one time only to decide, is that a stockholder responsibility, a ratepayer responsibility, or anywhere in between.

"That's all I have to say.

* * * * *

"CHAIRMAN SMYTH: We will come back to order.

"The commission feels very strongly, not just a little bit, that this was wrong, that we cannot have a rate case without giving notice to the public, and that any issues as to asking ratepayers to pay for amounts in the future, will be taken care of in future rate cases and will not be taken care of in this generic hearing which is to determine whether or not any amount should be involved.

"And therefore, there being no notice to the public, and certainly in these cases significant intervention has been made by the public in the past, we will restrict the hearing to those matters that have previously been noticed and that as to what rates you are required in the future to pay for any amounts that might be found will be a matter to be determined in the future rate case.

"And perhaps, since you already have one filed before

us, that it might be a more proper time to discuss those kinds of issues.

"So, if you will proceed on that basis, Mr. Girard.

"MR. GIRARD: Fine, thank you.

"I should have mentioned that when the revised rate schedules were filed, notice was posted, there was not a mailing made or I don't think a newspaper publication made. I wantd [sic] the record to show that, and I am not arguing it was adequate or what is not.

"We will present the case and the only question is, whether we should try and strike from it, if you will, before we ask our questions that material that might be offensive.

"One thing I think, Your Honor, Mr. Chairman, is that the testimony of witness Sloan, who is our rate witness, may be appropriate, and we will have to allow you of course to make the ruling when the time comes, to at least show for illustrative purposes the type of

impact there would be on the ratepayers.

"CHAIRMAN SMYTH: I might express to you that we will be restrictive and we are talking what is required rates of return at this time. That's matter for rate cases, and I am sure by the time we get down to that testimony, we will have had lots of testimony before this commission. I do not want to in any way impair your presentation of this case.

"However, the ground rules are those matters that are germane will be heard, those matters that are not presumably staff will object to them and they will not be heard, and if staff doesn't object to them, if I find they are not material I will certainly advise you, and as you well know I am not bashful in this manner.

"MR. GIRARD: I would stipulate that.

"(Laughter.)

"MR. ROGERS: So will staff."

Again, before presenting the testimony of PP&L's witness Watson:

> "MR. GIRARD: ***
>
> "This case, of course, based on the ruling of the Commission will not involve a contested rate case ***.
>
> * * * * *
>
> "I discussed this part with Staff Counsel because the concern, I'm sure, that Staff has and the Commission has is this isn't a general rate case. ***
>
> * * * * *
>
> "*** It is the Staff's position and has been from the beginning that the issue in this case is whether or not the ratepayer should pay. ***"

The Commission's investigation had for its purpose the determination of whether or not the investment, expenses and obligations incurred by PP&L and LV

in the projects could be considered in connection with rates later to be set for PP&L and LV in Wyoming.

> "(a) The term 'rate,' when used in this act, shall mean and include *** every *** charge or other compensation for service rendered or to be rendered *** and every *** practice, act, requirement or privilege in any way relating to such *** charge or other compensation ***." Section 37-1-102(a), W.S. 1977.

Section 37-2-117, W.S. 1977, supra, fn. 1, authorizes investigation of "any act *** accomplished or proposed, or an investigation of any rate" which the Commission believes should be made "to secure compliance with the provisions of this act and orders of the commission."

The association of PP&L and of LV with the projects are certainly acts and practices "in any way related" to the

charges and compensation for services to be rendered by them. And the Commission could well believe that an investigation was proper to determine if the projects were or could be part of that subsequently to be considered in fixing rates pursuant to § 37-2-122(a), W.S. 1977, infra, fn. 5.

The PSC concluded that the Agreements executed by LV and FR constituted a guarantee of securities as contemplated by § 37-6-101 et seq., W.S. 1977, and that their failure to obtain PSC authorization rendered the Agreements void for rate making and other purposes within the regulatory jurisdiction of the PSC. Further, that the costs incurred by LV, FR and PP&L could not be lawfully passed on to their rate payers, as the

projects were not and would not be "used and useful" for the convenience of the public.

Appellants LV, PP&L, WPPSS and CB all filed petitions for review of the Commission Order, which were ultimately consolidated. The district court affirmed the Commission Order without independent review, whereupon appellants appealed to this court.

Lower Valley, Washington Public Power Supply Service, and Chemical Bank

While all of the litigation below was going on, litigation was also progressing in other states. The decisions reached in the state of Washington are particularly significant to the case before us presently.

The Washington Supreme Court had before it the case of Chemical Bank, a New York corporation v. Washington Public Power Supply System, 99 Wash.2d 772, 666 P.2d 329 (1983). It involved WNP-4 and WNP-5, wherein CB brought a declaratory judgment action against WPPSS and the participants (those who had signed Participants' Agreements, including LV and FR) seeking a determination that the participants owe to WPPSS sufficient funds to pay the bonds, of which CB is trustee, with interest. The Washington Supreme Court held that the defendants who were Washington public utility districts or Washington municipalities lacked authority to enter into said agreement and as to them the agreement

was ultra vires, void ab initio, invalid, ineffective and unenforceable.

Subsequently, and pursuant to mandate from the Washington Supreme Court, the Superior Court of Washington for King County, in its Order and Judgment, held that:

> "2. Inasmuch as the Participants' Agreement is ultra vires, void ab initio, invalid, ineffective and unenforceable as to the defendants which are Washington public utility districts or Washington municipalities, and by reason thereof, the Participants' Agreement is also ineffective and unenforceable as to all other moving defendants and all participant defendants, on the grounds of (a) contract indivisibility and failure of the condition of substantially 100% participation, (b) mutual mistake as to the authority of Washington public utility districts and municipalities to enter into the Agreement, and

(c) frustration of purpose and impracticability."[2]

Further, the Superior Court held that:

> "3. For the aforesaid reasons, none of the moving defendants or any other participant defendant is obligated, under or by virtue of the Participants' Agreement or WPPSS Board of Directors Resolution No. 890, as amended (the 'Bond Resolution'), to make any payment to WPPSS, or to any other defendant, or to Chemical or any purchaser or holder of bonds issued by WPPSS in connection with the Projects."

We agree with the Washington Superior Court that because the Participants' Agreement is void ab initio

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[2] Chemical Bank v. Washington Public Power Supply System, Case No. 82-2-06840-3, August 11, 1983.

as to 68.275% of the participants,[3] it is also ineffective and unenforceable as to the other participants on the grounds quoted above. Therefore, we hold that the case at bar is moot as regards appellant LV. LV has no debt because of the projects' failure and the issue is not pertinent to any rate case now or hereafter filed by LV.

> "*** [W]hen no judgment rendered can be carried into effect the cause is moot ***." Belondon v. State, Wyo., 379 P.2d 828, 829 (1963).

This being so, we also hold that this case is moot as to WPPSS and CB, as their interests were predicated on

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[3] Namely, the Washington public utility districts and Washington municipalities.

the validity of the Participants' Agreement.

Pacific Power & Light

The above considerations do not control the disposition of appellant PP&L, as PP&L was not a participant under the Participants' Agreement, but rather a 10% owner of WNP-5, and 29.4% owner of Pebble Springs.

PSC founded its decision, relative to PP&L, on an application of the provisions of § 37-2-119, W.S. 1977, which provides in part:

> "In conducting any investigation pursuant to the provisions of this act the commission may investigate, consider and determine such matters as the cost or value, or both, of the property and business of any public utility, used and useful for the convenience of the public, and all matters

> affecting or influencing such cost or value ***."

Emphasizing the "used and useful" language of this section, PSC found the investment, expenses and obligations incurred by PP&L could not properly be considered in fixing the rate base for PP&L's operation.

If the projects had been successful and had gone on line for production of electricity for public convenience, the cost or value would have been properly considered in establishing a rate base. Since they were not successful and were only partially constructed, they could never become "property" of a "used and useful" nature. Although the project undertakings might conceivably be part of the "business" of

PP&L,[4] we need not determine such inasmuch as the business activity relating to the projects was not current so as to meet the "used and useful" requirement, as the "used and useful" status must be as of the time of rate consideration. Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923); Boston Gas Company v. Department of Public Utilities, 367 Mass. 92, 324 N.E.2d 372 (1975); South Dakota

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[4] Business is "'the habitual or regular occupation that the party was engaged in with a view to winning a livelihood or some gain,'" In re Lamont, 48 Wyo. 56, 41 P.2d 497, 502 (1935). Business is "'[a]ny occupation connected with the operations and details of trade or industry,'" Zurich Insurance Company v. Friedlander, 261 Md. 612, 276 A.2d 658, 660 (1971).

Public Utilities Commission v. Otter Tail Power Company, S.D., 291 N.W.2d 291 (1980).

Although the investment, expenses and obligations resulting from the projects do not conform to the "used and useful" concept, PP&L contends that they could still qualify for consideration in establishing a rate base if they are a prudent, reasonable and proper expense of operation.[5] Other jurisdictions have dealt with the obligations herein considered as operating expenses

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[5] Section 37-2-122(a), W.S. 1977, provides:

> "In determining what are just and reasonable rates the commission may take into consideration depreciation of plant, obsolescence of equipment,
>
> (Footnote continued)

and not as property under the "used and useful" principle.[6]

(Footnote 5 continued from previous page)
expense of operation, physical and other values of the plant, system, business and properties of the public utility whose rates are under consideration."

[6] See Office of Consumers' Counsel v. Public Utilities Commission, 67 Ohio St.2d 153, 21 Ohio Op.3d 96, 423 N.E.2d 820 (1981), dismissed Cleveland Electric Illuminating Company v. Office of Consumer's Counsel, 455 U.S. 914, 102 S.Ct. 1267, 71 L.Ed.2d 455 (1982), where the court quoted the commission order as stating, "'*** [t]hus, we now see the wisdom of the standard emerging from the cases from other jurisdictions; if the expenditures are prudent, amortization should be permitted.'" Id. 67 Ohio St.2d 153, 423 N.E.2d at 825. The court also said: "[t]he core issue *** is whether the commission lawfully and reasonably permitted CEI to treat its investment in the four cancelled nuclear generting stations as amortizable costs." Id. at 825. "There is no question but that the overwhelming weight of authority from other jurisdictions supports the position of the commission." Id. at 826. However,
(Footnote continued)

We cannot accept the investment, expenses, and obligations incurred in construction, or intended construction of property which would normally qualify as "used and useful" for inclusion in a rate base as an operating expense. An operating expense includes:

> "In general, various particular expenses of a public utility are properly chargeable to expense of operation, including any legitimate expense contributing to the better management or greater efficiency of the utility, a reduction of its investment, or an increase in its operating return. ***" 73B C.J.S. Public Utilities, § 36, p. 234.

Unified systems of accounts prescribed by most regulatory agencies usually specify

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(Footnote 6 continued from previous page) that court disallowed amortization, based on its interpretation of the Ohio statute relating to service-related costs that a utility may recover from its rate payers.

that considered as operating expenses, i.e. taxes, advertising, salaries, commodity purchases and similar items. The PSC recognizes that it cannot ignore the necessary, fair and reasonable expenses of operation incurred by a utility in the rendition of service, and also that there are certain expenses which should be disallowed, such as the following:

> "1. If the questioned outlays represent 'inefficiency' or 'improvidence,' or
>
> "2. Managerial discretion has been abused, or
>
> "3. The action taken has been 'arbitrary' or 'inimical' to the public interest, or
>
> "4. There has been 'economic waste,' or
>
> "5. Such outlays were not legitimate operating expenses

> because they were 'in excess of just and reasonable charges.'"[7]

In contending that the charges were "operating expenses," PP&L argues that a reasonable and prudent test should be allowed. We need not consider this test insofar as it applies to "operating expenses" since these charges were not "operating expenses" as that term is generally considered.

It is probable that PP&L would not contend these expenses to be "operating" ones if the projects were completed.

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[7] Brief of the Staff of the Wyoming Public Service Commission, before the Public Service Commission of the State of Wyoming, quoting from 1 A. Priest, Principles of Public Utility Regulation, p. 51 (1969).

PP&L would then own a percentage of property; and it would expect to have the cost of the project included in the amount attributed to its "used and useful" property in establishing a rate base.

The argument in this case results from the situation in which PP&L suffers financial loss due to failure of a project intended to become "used and useful" in the service of the public. PP&L wants to include the loss in its financial picture whereby an increase in rates will eventually pay for the loss, i.e., the loss will be borne by the consumers. P&L believes this proper inasmuch as service rendered by an electric power utility is limited by the availability of the supply of the product

it furnishes. The same can be said of some other utilities. A prudent and reasonable attempt to secure or preserve such supply could well be considered a service rendered on behalf of the consumers.[8] When the life of a utility is limited by such supply, amortization of an entire plant investment has been allowed. Pennsylvania Power & Light Company v. Pennsylvania Public Utility Commission, 10 Pa.Cmwlth. 328, 311 A.2d 151 (1973); Clarksburg Light & Heat Co. v. Public Service Commission, 84 W.Va. 638, 100 S.E. 551 (1919); East Ohio Gas

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[8] It should also be noted that utilities are under a statutory duty to provide service that is adequate and safe. Section 37-3-112, W.S. 1977. This may carry with it the obligation to take some action to insure future supplies.

Co. v. Public Utilities Commission, 137 Ohio St. 225, 28 N.E.2d 599 (1940). PP&L contends that successful effort in this endeavor would redound to the benefit of the consumers by furnishing a more abundant and cheaper supply of the product and, thus, the failure of the effort should be at the expense of the consumers.

On the other hand, PSC considers the failure of the projects as one of the risks incurred by PP&L when it entered into them. PSC would have the stockholders of PP&L bear the loss since the decision to embark upon the project was made by their representatives who had an opportunity to calculate the risk and to be governed by such calculation. If PP&L gauged the risk with the intention

that the loss would be borne by the consumers, there would be no risk at all for PP&L (the stockholders). This fact might encourage PP&L to venture into activities having a very small chance of economic success with the knowledge of no loss to it should the activity fail and of great gain should the small chance of success occur.

If the consumers are to take the risk, it would seem that they should have some say as to whether or not the projects are to be undertaken. Only PSC is properly in a position to be concerned with the consumer interest in consideration of the propriety of the risk activity and to balance the interests of the consumer and the utility.

In McCulloch Gas Transmission Company v. Public Service Commission of Wyoming, Wyo., 627 P.2d 173, 179 (1981), we said:

> "As pointed out in Public Service Commission for the State of New York v. Federal Power Commission, D.C. Cir. 1972, 467 F.2d 361, the primary mission of a regulatory body is to protect the consumer, it must 'strive to reach a balance between consumer, producer, and those whose interests fall in between.' The fixing of just and reasonable rates by the PSC involves a balancing of investor and consumer interests, but a fair return to investors is not necessarily fair to consumers. Petition of New England Tel. & Tel. Co., supra [115 Vt. 494] 66 A.2d [135] at 147."

PSC is not in a position to take on any aspect of utility management. It must restrict its position to "regulation" with management decisions being

entirely that of the utility. The difficulty surfaces when it is necessary to distinguish between "regulation" and "management."

Regulation by means of setting rates and determining the factors controlling such by necessity prescribes the "management" domain. Section 37-2-121, W.S. 1977, empowers the commission to act when it determines a rate to be "inadequate or unremunerative, or to be unjust, or unreasonable, or unjustly discriminatory, or unduly preferential" and it may "fix *** such rate as it shall determine to be just and reasonable and in compliance with the provisions of this act." PSC has authority to "prescribe and order" changed "any service or service regulation" as it shall determine "to

be unjustly discriminatory or unduly preferential," or "any service or facility" found "to be inadequate or unsafe," or "any facility or service regulation" found "to be unjust or unreasonable." Section 37-2-122(b), W.S. 1977.

"Regulation" also can be said to limit "management" aspects in connection with certain debt acquisitions by utilities.

> "The right of every gas corporation and of every electrical corporation operating as a public utility in the state of Wyoming to issue, assume or guarantee securities and to create liens on its property situated within the state of Wyoming is a special privilege, hereby subjected to the supervision and control of the public service commission of the state of Wyoming, as hereinafter in this act [§§ 37-6-101 to 37-6-107] set forth. Such public utility when authorized by order of the commission and

not otherwise, may issue stocks and stock certificates and may issue, assume or guarantee other securities payable at periods of more than eighteen (18) months after the date thereof, for the following purposes: for the acquisition of property; for the construction, completion, extension or improvement of its facilities; for the improvement or maintenance of its service; for the discharge or lawful refunding of its obligations; for the reimbursement of monies actually expended for said purposes from income or from other monies in the treasury not secured by or obtained from the issue, assumption or guarantee of securities, within five (5) years next prior to the filing of an application with the commission for the required authorization; or for any other purpose approved by the commission." Section 37-6-101, W.S. 1977.

Section 37-6-102, W.S. 1977, provides that such securities may be issued only after application therefor is filed with the PSC and after a hearing

from which the Commission does not find that such

> "transactions are inconsistent with the public interest; or that the purpose or purposes thereof are not permitted by this act [§§ 37-6-101 to 37-6-107]; or that the aggregate amount of the securities outstanding and proposed to be outstanding would exceed the fair value of the properties and business of the public utility."

And § 37-6-106, W.S. 1977, provides that such securities shall be void if "issued, assumed or guaranteed without application to or approval of the commission."

Section 37-3-111, W.S. 1977, provides in part that:

> "Every public utility shall file with the commission copies of contracts, agreements or arrangements to which it may be a party, as the commission may designate. ***"

Section 218 of PSC Rules (1979) requires the filing with it of a copy of all "special contracts which govern the sale by the utility of public utility service or the purchase by the utility of a utility commodity for resale."

It is recognized that the foregoing statutes and rule do not require PSC approval for PP&L's part ownership of the terminated projects. The reference to the statutes and rule is only to exemplify the "management" control by PSC in utility operation. It is a necessary adjunct to "regulation."

Black's Law Dictionary (5th Ed. 1979) defines "regulate" as:

> "To fix, establish, or control; to adjust by rule, method or established mode; to direct by rule or restriction;

to subject to governing principles or laws."

"*** Regulation is an exercise of control while management is an exercise of conduct, in carrying on business. ***" Cloutier v. State Milk Control Board, 92 N.H. 199, 28 A.2d 554, 558 (1942).

"*** 'The word "regulate" is one of broad import. ***'" Blumenthal v. City of Cheyenne, 64 Wyo. 75, 186 P.2d 556, 566 (1947), quoting from City of Owensboro v. Cumberland Telephone & Telegraph Co., 230 U.S. 58, 33 S.Ct. 988, 992, 57 L.Ed. 1389 (1913).

"*** 'The power *** to "regulate" *** implies the right to prescribe and enforce all such proper *** rules and regulations as may be deemed necessary and wholesome in conducting such business in a proper and orderly manner. Ogden City v. Leo, 54 Utah 556, 182 P. 530, 5 A.L.R. 960.'" Jensen v. Town of Afton, 59 Wyo. 500, 143 P.2d 190, 201 (1943).

"*** prohibit[ing] an incident to or a particular

> method in connection with business. *** is merely regulation. *** [R]egulation necessarily implies restriction in some respects and that that means nothing more or less than a partial prohibition. ***" Steffey v. City of Casper, Wyo., 357 P.2d 456, 461 (1960).

The PSC is vitally concerned with fixing of rates. If an effort to obtain a new source of energy supply will affect rates--potentially lowering them if successful and potentially raising them if not successful, PSC has the power to control the effect such project will have on rates. This does not mean that it has the power to dictate whether or not the project should be undertaken or to concern itself with other aspects of the conduct relative to the project. The utility need not consult PSC before embanking on the project. However, if

the utility wishes to involve the consumer in a loss or cost resulting from failure of the project, i.e., if it wishes to have such cost or loss considered in subsequent rates, PSC's prior approval is necessary.

In briefs and arguments, the parties make reference to other instances in which PSC has authorized inclusion in the rate base of costs of wells for gas which could turn into dry holes, costs for early retirement of obsolete (for environmental reasons) mechanical flue gas stacks, costs for an abandoned hydro project as a result of federal legislation, etc. Usually the activity which subsequently failed was approved as an activity prior to its inception by the

PSC or it consisted of property with a used and useful history.

Although we cannot attribute a consideration by PSC in determining just and reasonable rates of an investment of questionable return in a potential product producing project to (1) the used and useful property or business of the utility, or (2) to an operating expense of it, we do recognize the authority of the PSC to consider such as a part of the "other values of the *** system, business *** of the public utility," § 37-2-122(a), W.S. 1977 (see fn. 5), if the consideration, and only if the consideration is given before the investment is

made or agreed to be made.[9] The requirement for prior approval of the PSC is necessary so that the risk attributable to the consumers can be evaluated and be either rejected or accepted--or, perhaps, the proportion of the risk to be borne by the consumers, if unsuccessful, can be set. The conversion computations to a used and useful property, if successful, and the period of amortization, if unsuccessful and such becomes necessary, can be predetermined. The percentage of the investment attributable to the Wyoming operation can be ascertained. All to be done before the fact of success

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[9] PP&L's project had a book value as part of its system or business when the investment was made. After it failed, it had no value at all.

or failure is known. As noted, this consideration and resulting decision will affect a "management" aspect within "regulation," but it is a type of regulation necessary and proper for the exercise of the power and duties of the PSC.

In this instance, the PSC was not consulted prior to the investment about it. It was not necessary to do so. But when the investment failed, the onus of the failure must rest on PP&L, the only one which considered the risk and, therefore, the only one accepting it.

Affirmed as to PP&L and dismissed as moot as to the other appellants. LV's rate applications are to be processed without consideration of its involvement in the projects.

ROSE, Justice, specially concurring.

I concur with the result reached by the majority but do not join in that portion of the opinion which would allow the consumers to bear all costs associated with canceled construction projects so long as the Public Service Commission (PSC) had approved the projects prior to investment by the utility. As I interpret Wyoming's statutory scheme pertaining to the regulation of public utilities, the PSC is without authority to accept or veto <u>proposed</u> construction projects for the purpose of shifting their cost to ratepayers. Furthermore, even if the PSC possessed such authority, the ratemaking principles embodied in our statutes do not permit

the recovery of costs associated with construction projects which are terminated before ever providing service to utility customers.

I

This court has consistently held that the PSC possesses only that power and authority granted to it by the Wyoming Constitution and statutes. The enabling statutes must be strictly construed and any reasonable doubt as to the existence of any power must be resolved against its exercise. Public Service Commission v. Formal Complaint of WWZ Company, Wyo., 641 P.2d 183 (1982); Phillips Petroleum Company v. Public Service Commission, Wyo., 545 P.2d 1167 (1976); Tri-County Electric Association, Inc. v.

City of Gillette, Wyo., 525 P.2d 3 (1974).

The general powers of the PSC are set out in § 37-2-112, W.S. 1977:

> "The commission shall have general and exclusive power to regulate and supervise every public utility within the state in accordance with the provisions of this act."

This statute, as the majority recognize, empowers the PSC to regulate and supervise utilities, not to manage[1] them. Regulation and supervision, however, necessarily entail control over the effects of decisions made by those who manage public utilities.

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[1] The American Heritage Dictionary defines "manage" to mean: "To direct or administer (the affairs of an organization, estate, household, or business)."

The position advocated by the majority would extend the PSC's sphere of control to cover not only the effects of managerial decisions but the decision-making process itself. In support of their position, the majority cite and discuss a number of provisions in our regulatory scheme as illustrative of the degree of control that the PSC exerts over management as a necessary adjunct to regulation. These statutes, in my judgment, emphasize the supervisory or watchdog function of the PSC in protecting the public interest. Section 37-2-122, W.S. 1977, authorizes the PSC to eliminate existing services, facilities, and regulations which are inadequate, unsafe, unjust, or unreasonable. Section 37-6-101, W.S. 1977, empowers the PSC to

supervise the issuance of securities and the creation of liens, activities which are regulated in competitive as well as monopolistic enterprises in order to protect the public investor. Section 37-6-102, W.S. 1977, mandates PSC approval of proposed securities transactions unless such transactions are inconsistent with the public interest, unlawful, or exceed the assets of the utility. Finally, § 37-3-111, W.S. 1977 and PSC Rule 218 require public utilities to file designated contracts in order to keep the PSC informed.

Clearly, these statutes authorize the PSC, in obeying its charge to guard the public interest, to monitor the business decisions previously made by utility executives. Using these statutes

as a foothold, however, the majority make what I consider to be a monumentally faulty and frighteningly unjustified logic-leap to the conclusion that the PSC has the authority to rule on the viability of proposed utility projects with respect to whether consumers will bear the risk of failure. To deny that such authority would encompass the power to dictate whether a particular project should be undertaken is to deny reality. Utility executives would be compelled to consult the PSC and obtain approval before embarking on any project, or face possible stockholder suits for mismanagement in the event the project fails. The PSC would, in effect, be making crucial decisions concerning utility proposals--all in the name of regulation and, with

all due respect to our Public Service Commission and its able membership, the PSC is not required to be qualified and probably is not qualified to make such delicate and technical public utility management decisions.

The function of the PSC is to protect the consumer through the regulation of public utilities, while taking into consideration the legitimate interests of the utilities. McCulloch Gas Transmission Company v. Public Service Commission of Wyoming, Wyo., 627 P.2d 173 (1981). In carrying out this function, the PSC is empowered to control the effect that new energy projects will have on rates--but only after the utility management has assessed the merits and drawbacks of the proposal and reached a

final decision based on sound business judgment, and only after the project has become used and useful in providing energy. It is not the function of the PSC to provide an insurance policy under which the ratepayers will protect the investments of utility stockholders against all risks. This court recognized as much in McCulloch Gas Transmission Company v. Public Service Commission of Wyoming, supra, 627 P.2d at 179, where we described the regulatory function of the PSC and said:

> "*** The public interest is to be given paramount consideration; desires of a utility are secondary. Big Horn Rural Electric Co. v. Pacific Power & Light Co., Wyo. 1964, 397 P.2d 455. The purpose of the PSC's authority is to protect the public from utilities

affected with a public interest."

Not only is the participation by a state agency in a utility's business decisions unnecessary to regulation, it is impermissible. The United States Supreme Court in State of Missouri ex rel. Southwestern Bell Telephone Company v. Public Service Commission of Missouri, 262 U.S. 276, 289, 43 S.Ct. 544, 547, 67 L.Ed. 981, 985 (1923), said:

> "*** It must never be forgotten that while the State may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in State Public Utilities Commission ex rel. Springfield v. Springfield Gas and Electric Company, 291 Ill. 209, 234 [125 N.E. 891].

> "'The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation ***.'" (Emphasis added.)

The proper relationship between regulators and regulated enterprises was described by 1 Priest, Principles of Public Utility Regulation, p. 23:

> "Where inefficiency or improvidence or economic waste or abuse of discretion or action inimical to the public interest have been demonstrated, the agency having jurisdiction may intervene. Business decisions are, however, the prerogative of management. Regulators are not the masters of public utility enterprises. They may, and often should, breathe down the executive's neck, but the basic responsibility is his, not theirs."

The majority opinion would permit utility companies to recover their

investments in terminated construction projects, ineligible for inclusion in rate base or operation expenses, if the proposal is first submitted to the PSC for approval. I conclude that the exercise of such power by the PSC would exceed the scope of the enabling statutes and implicate constitutional proscriptions concerning private property.

II

The majority conclude, and I agree, that Pacific Power & Light Company's capital investment in the now terminated nuclear plants cannot properly be included in the rate base as used and useful property or be amortized as an operating expense. However, the majority would permit the PSC, in determining just and reasonable rates, to consider the

costs associated with such investments under the "other values" language of § 37-2-122(a), W.S. 1977. That statute provides:

> "In determining what are just and reasonable rates the commission may take into consideration depreciation of plant, obsolescence of equipment, expense of operation, physical and other values of the plant, system, business and properties of the public utility whose rates are under consideration."

Under this statute, the decisive question is whether "an investment of questionable return in a potential product producing project" (majority opinion 677 P.2d at 808) is one of the "other values of the plant, system, business and properties of the public utility," which may properly be considered for ratemaking purposes. I conclude that it is not, because to allow

the PSC to consider the value of a construction project which ultimately fails is to circumvent the used and useful principle of § 37-2-119, W.S. 1977.[2] I would interpret the physical and other--presumably nonphysical--values specified

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[2] Section 37-2-119, W.S. 1977, provides as follows:

> "In conducting any investigation pursuant to the provisions of this act the commission may investigate, consider and determine such matters as the cost or value, or both, of the property and business of any public utility, used and useful for the convenience of the public, and all matters affecting or influencing such cost or value, the operating statistics for any public utility both as to revenues and expenses and as to the physical features of operation in such detail as the commission may deem advisable; the earnings, investment and expenditures of any such corpo-
>
> (Footnote continued)

in § 37-2-122(a), supra, as encompassing only the values of those items properly includable in the rate base. That is, § 37-2-122(a) empowers the PSC to consider for ratemaking purposes only the property and business of the public utility which is used and useful in producing the product. I cannot attribute to the legislature the intent to embody in the

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(Footnote 2 continued from previous page)
ration as a whole within this state, and as to rates in local exchanges or plants of any telephone, telegraph, water, electrical or gas corporations, the geographical location thereof shall be considered as well as the population of the municipality in which such plant or exchange is located."

ratemaking formula both the used and useful principle and the means to annihilate that principle.[3]

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[3] See Office of Consumers' Counsel v. Public Utilities Commission, 67 Ohio St.2d 153, 423 N.E.2d 820 (1981), where the Ohio Supreme Court refused to interpret a catch-all statute so as to permit the commission to consider the utility's investment in four terminated nuclear power plants as amortizable costs. The court said:

> "*** The commission views [the pertinent statute] as a virtual wild card to be played whenever the commission in its discretion sees fit. We interpret the statute less sweepingly, first because the provisions are linked inextricably with the ratemaking factors contained in [the statute specifying permissible considerations in ratesetting proceedings], and secondly because the General Assembly undoubtedly did not intend to build into its recently revised (1976) ratemaking formula a means by which the commission may effortlessly abrogate that very formula." 423 N.E.2d at 828.

The majority cite several instances in which the PSC has considered for ratemaking purposes the costs of projects not currently useful in supplying the product. Such consideration was permissible, according to the majority, since the terminated activity had received the prior approval of the PSC or had a used and useful history. I would have held that our statutory scheme, including the used and useful principle, contemplates the consideration of the costs attributable to the cited projects, without expanding the meaning of the "other values" language of § 37-2-122(a) and notwithstanding a lack of prior approval by the PSC.

Pursuant to § 37-2-122(a), supra, obsolescence of previously useful

equipment is a proper factor to be considered in setting just and reasonable rates. The cost of drilling a dry gas well is properly categorized as an operating expense, since gas, unlike electricity, is a commodity for which the utility must search in order to provide service. The search for gas necessarily includes the drilling of a certain percentage of dry holes, whereas the production of electricity does not necessarily include the building of a certain percentage of defunct plants. I agree with the pronouncement of the Ohio Supreme Court in East Ohio Gas Co. v. Public Utilities Commission, 137 Ohio St. 225, 28 N.E.2d 599, 609 (1940), concerning the propriety of considering the cost

of gas leaseholds which turn out to be unproductive:

> "It must be apparent that the cost of acquiring, holding for a time during which delay rentals must be paid, testing and finally canceling unproductive acres is the only method by which productive gas acres can be found and developed, and it is equally apparent that this expense must be borne by the consumer who ultimately uses the gas from the productive acres."

It is not necessary to expand our existing statutory scheme in order to justify the recovery of these types of costs through rates.

I conclude that the statutory formula for setting just and reasonable rates does not permit the consideration of utility investments which are not attributable to the rate base and which are not properly designated as costs of

operation. I would adopt the position reiterated by the Ohio Supreme Court when faced with a question of statutory interpretation under circumstances similar to the instant case:

> "*** '*** It is only proper that their [the investors] venture be found operational before they commence to recoup their capital outlays from the consumers.' ***" Office of Consumers' Counsel v. Public Utilities Commission, 67 Ohio St.2d 153, 423 N.E.2d 820, 829 (1981), quoting from Office of Consumers' Counsel v. Public Utilities Commission, 58 Ohio St.2d 449, 456-457, 391 N.E.2d 311 (1979).

THOMAS, Justice, dissenting.

I must dissent in part from the decision reached by the majority of the court in this case. I am in accord that the case must be dismissed as to Lower Valley Power & Light, Inc., Chemical Bank

and Washington Public Power Supply System because it is moot. With respect to Pacific Power & Light Company, however, I would hold that the Public Service Commission had no authority to enter the order which it entered, and I would remand the case with directions that it be dismissed.

The remarkable thing in connection with the disposition of this case by this court is that the majority opinion and the concurring opinion refer to and discuss the correct legal propositions, but they apply them in an erroneous manner. In Justice Rose's special concurring opinion he very ably articulates the proposition that the Public Service Commission has only that power and authority granted to it by the Wyoming

Constitution and statutes, and that the statutory powers must be strictly construed. There is no need to again cite the authorities which encompass those holdings. At page 808 of the majority slip opinion the court aptly says:

> "It is recognized that the foregoing statutes and rule do not require PSC approval for PP&L's part ownership of the terminated projects."

The document which initiated Pacific Power & Light Company's involvement in this proceeding was a notice and order setting hearing which was entered on April 22, 1982, and that document did not reflect the justification for the investigation by the Public Service Commission. It is clear, however, that

the commission did proceed pursuant to § 37-2-117, W.S. 1977, which provides:

> "Whenever the commission shall believe that an investigation of any act or omission to act, accomplished or proposed, or an investigation of any rate, service, facility or service regulation of any public utility should be made in order to secure compliance with the provisions of this act and orders of the commission, it may of its own motion summarily investigate the same." (Emphasis added.)

While I might rely simply upon the concession in the majority opinion to the effect that no investigation was needed to secure compliance with the provisions of the act or the orders of the commission, I will point out that this record and the arguments of counsel for the commission are devoid of any reference to any statute or order of the

commission with which compliance by Pacific Power & Light Company needed to be secured. I am prepared to concede that the commission might investigate in order to determine if such a situation existed, but once it determined that there was no justification for the investigation I cannot perceive any authority which would permit the Public Service Commission to enter the order that it did in this instance.

I recognize that it is popular to ride on the judicial steam roller which has flattened Washington Public Power Supply System. While I might be in sympathy with the result which the Public Service Commission and this court reaches, I find I have no empathy for what I believe to be an abuse of the

commission's authority which this court has sustained.

I understand that the Public Service Commission has told Pacific Power & Light Company that if Pacific Power & Light Company should wish to include its investment costs in these abandoned nuclear power plants in any future rate to be applied to Wyoming consumers that the Public Service Commission of Wyoming will not permit that. Purely and simply that is an advisory order from the Public Service Commission, and our statutory scheme does not justify such an approach. This court has said that it does not render advisory opinions, and we dismiss cases in which an advisory opinion is sought. Aetna Casualty and Surety Company v. Langdon, Wyo., 624 P.2d 240

(1981); Kwallek v. State, Wyo., 596 P.2d 1372 (1979); Police Protective Association of Casper v. City of Casper, Wyo., 575 P.2d 1146 (1978); State v. Rosachi, Wyo., 549 P.2d 318 (1976); Knudson v. Hilzer, Wyo., 551 P.2d 680 (1976); and Tobin v. Pursel, Wyo., 539 P.2d 361 (1975). In part the fact that this court does eschew advisory opinions is premised upon the proposition that there is no way in which the judgment which is rendered may be carried into effect. Perhaps the result is to make the case moot as discussed on page 802 of the majority slip opinion. The point, however, is that the Public Service Commission, without statutory authority, does not have any business entering an order such as this; and yet, by affirming what the Public Service

Commission has done, this court has, in effect, and contrary to a longstanding jurisprudential discipline, joined in an advisory opinion. No matter how much the parties want an answer to this question we should not so casually abandon that rule of jurisprudence.

As indicated, I would reverse the order of the Public Service Commission because this court has the duty to hold unlawful and set aside agency action which is in excess of statutory authority. Section 16-3-114(c)(ii), W.S. 1977 (Oct. 1982 Rev.).

IN THE SUPREME COURT, STATE OF WYOMING

OCTOBER TERM, A.D. 1983

PACIFIC POWER & LIGHT COMPANY, a corporation,	)	
Appellant (Petitioner),	)	
v.	)	No. 83-75
THE PUBLIC SERVICE COMMISSION OF WYOMING,	)	
Appellee (Respondent).	)	

ORDER DENYING REHEARING

Pacific Power & Light Company having made application for rehearing in this matter, and the court being fully advised, it is

ORDERED that Pacific Power & Light Company's Application for

Rehearing be, and the same hereby is, denied.

Dated March 8, 1984.

By the Court

ss/John J. Rooney
John J. Rooney
Chief Justice

BEFORE THE PUBLIC SERVICE COMMISSION

OF WYOMING

IN THE MATTER OF THE INVESTIGATION OF LOWER VALLEY POWER AND LIGHT, INC.	)	DOCKET NO. 9617 SUB 11
IN THE MATTER OF THE INVESTIGATION OF FALL RIVER RURAL ELECTRIC COOPERATIVE, INC.	)	DOCKET NO. 9628 SUB 6
IN THE MATTER OF THE INVESTIGATION OF PACIFIC POWER & LIGHT COMPANY	)	DOCKET NO. 9454 SUB 17

MEMORANDUM OPINION AND FINAL ORDER

The Commission initiated this investigation of the participation by Wyoming jurisdictional public utilities in the Washington Public Power Supply System (WPPSS) nuclear generation plant construction projects known as WNP 4 and 5.

The Commission having considered the evidence adduced at public hearings and being advised in the premises, FINDS and CONCLUDES that:

FINDINGS AND CONCLUSIONS CONCERNING JURISDICTION AND PROCEDURE FINDINGS OF FACT

1. Lower Valley Power and Light, Inc. (Lower Valley) is a distribution level electric cooperative providing service in Afton, Jackson and the surrounding communities and areas in Lincoln and Teton counties in Wyoming. Fall River Rural Electric Cooperative, Inc. (Fall River) is also a distribution level electric cooperative serving approximately 114 Wyoming consumers and approximately 6600 consumers in Idaho and Montana. Pacific Power & Light Company

(Pacific Power) is a publicly held corporation providing electric service as a regulated public utility in Wyoming, Idaho, Montana, Oregon, Washington and California. Communities served by Pacific Power in Wyoming include Casper, Laramie, Lander, Rawlins, Riverton, Worland, and Rock Springs. Pacific Power also wholesales electric power to Wyoming utilities (e.g., Cheyenne Light, Fuel & Power Co.) and municipalities which have their own distribution systems (e.g. Basin and Powell).

The Independent Staff of the Commission acted separate and apart from the Commission in investigating and examining these matters from a consumer interest viewpoint. The Independent Staff was permitted to intervene and

participate as a party pursuant to W.S. 9-4-111 and 9-4-112(c) of the Wyoming Administrative Procedure Act and Commission Rule Section 103(c). The assigned Independent Staff had no contact with the Commission except in the public proceedings in this matter.

2. On November 4, 1981, the Independent Staff of the Public Service Commission brought a Petition in Docket No. 9617 Sub 11 for authority to conduct an investigation concerning the participation by Lower Valley Power and Light Company in the Washington Public Power Supply System's construction of Units 1 through 5. On November 13, 1981, an Order was entered granting the Petition. On November 19, 1981, Lower Valley filed its Petition which also requested

that the Commission Staff investigate Lower Valley's involvement with the WPPSS projects. On the 10th day of December, 1981, the Commission again reaffirmed its prior Order requiring an investigation of the matter. Subsequently, on April 19, 1982, the Commission entered its Notice and Order Setting Hearing in this docket. Hearing was set for June 16, 1982 in Cheyenne, Wyoming.

Three days after the Commission set the matter for hearing concerning Lower Valley's participation in these projects, the Commission entered another Notice and Order Setting Hearing which required a consolidated hearing for Lower Valley in Docket No. 9617 Sub 11, Fall River Rural Electric Cooperative, Inc. in Docket No. 9628 Sub 6, and Pacific Power

and Light Company in Docket No. 9454 Sub 17. The consolidated investigation was for the purpose of considering the participation by these three electric utilities in the WPPSS nuclear power projects. The consolidated hearings were to commence on June 16, 1982 in Cheyenne, Wyoming.

3. On May 26, 1982, the Independent Staff filed its Motion for Continuance which was unopposed, and on May 28, 1982 the Commission granted that Motion. Those persons seeking to intervene were required by the Commission's Order to present their petitions to intervene before July 2, 1982, and hearings were scheduled to commence on July 12, 1982 in Cheyenne, Wyoming.

4. Publication of the change of hearing date and the Commission's Order was accomplished by publishing the Order in the newspapers of general circulation in the communities of Casper, Laramie, Lander, Rawlins, Riverton, Worland, Rock Springs, Jackson and Afton. No party intervened within the time period required by the Commission's Order. However, on September 1, 1982 the Commission received a Petition to Intervene by FMC Corporation which was denied by the Commission since hearings had already been had.

5. Hearings were conducted from July 12th through the 16th, 1982 in Cheyenne, Wyoming. Protest statements were received in conjunction with another hearing held in Afton on July 20, 1982

and in Jackson on July 22, 1982 in Docket 9617 Sub 12. Briefs were filed by the Companies and the Independent Staff on September 3, 1982.

6. During the hearings Pacific Power presented evidence without objection concerning its participation in another nuclear power project known as Pebble Springs. Pebble Springs is not in any way connected with the WPPSS projects. Neither the Commission nor any participant made note of the fact that the investigation of Pebble Springs was not noticed to the public or required to be investigated by the Commission's Notice and Order Setting Hearing. While the Commission realizes that such a procedural defect should cause us to reset the inquiry into Pebble Springs for

hearing after public notice, we believe that the public interest will not be served by withholding a decision relating to Pebble Springs and that no harm will be done. We come to this conclusion after considering the following: a) the facts upon which we rely in making our decision are straight forward and there can be no dispute over these facts; b) the principles upon which we base our decision are as applicable to Pebble Springs as they are to the WPPSS projects; c) the parties in their presentation, briefs, and arguments, carefully and fully developed the law, and competing theories and arguments for our considerations; and d) our decision will not cause rates to increase. The

Commission therefore finds that the public interest will not be served by withholding a decision in this matter.

7. Lower Valley Power and Light Company, Fall River Rural Electric Cooperative, Inc., and Pacific Power and Light Company are public utilities within the jurisdiction of the Commission.

8. The Commission has the power to investigate and determine whether costs associated with capital expenditures in abandoned or cancelled power projects shall be passed on to ratepayers in the form of increased rates. See W. S. 37-2-112, 37-2-116, 37-2-119, 37-2-127.

FINDINGS ON WPPSS POWER PROJECTS

9. The Washington Public Power Supply System is a Joint Operating Agency organized in 1957 under Washington law

for the purpose of building, owning and operating electric generation and transmission facilities and for the purpose of selling electric power to its members and others from those facilities. Tr. Vol. IV p. 904. WPPSS is composed of 23 members consisting of four Washington cities and 19 Washington public utility districts. Tr. Vol. III p. 676. Between 1970 and 1975 WPPSS decided to undertake the construction of five nuclear power plants known as WNP 1 through 5. Tr. Vol. III pgs. 676-679.

WNP 1, 2, and 3 were financed by WPPSS through an arrangement with the Bonneville Power Administration known as the "net billing agreement." Under this agreement WPPSS would construct plants and would provide to BPA the output of

the plants at cost in return for an equal credit on power bills they received from BPA. This resulted in BPA averaging the higher cost nuclear power with the lower priced hydro power, and with the BPA indirectly backing the plant construction, the result was the highest possible ratings for the project's bond issues. Tr. Vol. IV p. 906-7.

WNP 4 and 5 were financed differently because BPA could not provide the backing for these additional units through the net billing agreement. WPPSS enlisted 88 electric utility cooperatives and public utility districts in its efforts to gather the financial backing needed for these additional projects. Among the 88 participants were Lower Valley with a 0/837% participant's share in

WNP 4 and 5, and Fall River with a 0.648% participant's share in these two units. In addition, Pacific Power was a 10% owner of WNP 5. Tr. Vol. IV p. 907, 956; Vol. IV p. 451. While Pacific Power financed its 10% ownership share of WNP 5, WPPSS financed its ownership of WNP 4 and its 90% ownership of WNP 5 through the sale of municipal tax-exempt bonds. In turn the 88 participants each signed a Participant's Agreement which entitled them to a percentage share of WPPSS power from units 4 and 5 at cost, and obligated each utility to pay this same proportion of total WPPSS costs "whether or not" the projects were completed. Tr. Vol. IV p. 956; Fall River Exhibit 10 Tr. Vol. I p. 98; Lower Valley Exhibit 15. These Participants' Agreements were executed on

July 14, 1976 by Lower Valley and Fall River. Pacific Power also entered into its ownership agreement with WPPSS on WNP 5 on July 14, 1976. LV Exhibit 15; FR Exhibit 10; Tr. Vol. IV p. 678.

FINDINGS CONCERNING GUARANTEE OF WPPSS BONDS

10. The provisions of the Participant's Agreements that both Lower Valley and Fall River executed are identical (FR Exhibit No. 10 and LV Exhibit No. 15). Section 4 of the Participant's Agreement requires WPPSS to issue and sell bonds to finance the cost of construction of the projects, and to pay or provide for the payment of the principal, interest, and premium on the outstanding bonds. In Section 5 of the Participant's Agreement,

Lower Valley and Fall River agree to purchase a share of the project's capability. The purchase price to be paid by Lower Valley and Fall River each year for its Participant's share is the amount specified in the billing statement provides by WPPSS.

11. Section 6(d) of the Participant's Agreement provides:

> "The participant shall make the payments to be made to supply system under this agreement whether or not any of the projects are completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of either project for any reason whatsoever in whole or in part. Such payments shall not be subject to any reduction, whether by offset or otherwise, and shall be conditioned upon the performance or nonperformance by supply system or any other participant or entity under this or any other agreement or instrument, the

remedy for any performance being limited to mandamus, specific performance or other legal or equitable remedy."

Because participants agreed to make payments to WPPSS regardless of whether the projects were ever completed; and because the payments that Lower Valley and Fall River must make to WPPSS for WNP 4/5, aside from termination costs, are directly tied to the principal and interest payments on WPPSS bonds, the Participant's Agreement Section 6(d) is for all intents and purposes a guarantee of the WPPSS bonds which financed the projects.

12. The Participant's Agreements executed by Lower Valley and Fall River were not submitted to the Public Service Commission for its review or approval at

the time of their execution or at any subsequent time prior to these proceedings. Tr. Vol. I p. 107, 203; Vol. IV p. 908.

13. Wyoming Statute 37-6-101 provides in pertinent part that

> "a public utility when authorized by order of the Commission and not otherwise, may issue stocks and stock certificates and may issue, assume or guarantee other securities payable at periods of more than 18 months after the date thereof for the purposes of acquisition of property, or the construction of facilities..."

The WPPSS bonds that were issued are payable at periods more than 18 months after issuance and were for the purpose of acquisition of property and the construction of facilities.

Wyoming Statute 37-6-106 provides that "all securities issued, assumed or guaranteed without application to or approval of the Commission...shall be void."

CONCLUSIONS OF FACT AND LAW ON GUARANTEE OF WPPSS BONDS

14. The Participant's Agreements entered into by Fall River and Lower Valley with the Washington Public Power Supply System constitute a guarantee of securities as contemplated by Wyoming Statute 37-6-101 and Wyoming Statute 37-6-106.

15. Fall River and Lower Valley did not comply with Wyoming Statute 37-6-101 and 37-6-106 by failing to apply for or obtain the Commission's authorization to

issue the guarantee contained in the Participant's Agreements.

16. The failure of Fall River and Lower Valley to obtain the Commission's authorization to guarantee the WPPSS securities renders the Participant's Agreement void for rate making and other purposes within the regulatory jurisdiction of the Commission. W.S. 37-6-106.

17. Because the Participant's Agreement is void for ratemaking and other purposes within the regulatory jurisdiction of the Commission, the costs incurred by these public utilities because of the guarantee in the Participants' Agreements cannot and should not be lawfully passed on to Fall River or Lower Valley ratepayers.

FINDINGS CONCERNING WPPSS TERMINATION

18. Construction of WNP 4 and 5 was terminated by WPPSS in January 1982. WNP 4 was approximately 20% complete and WNP 5 was approximately 16% complete when terminated. Tr. Vol. III p. 709; Tr. Vol. IV p. 914. These projects are being terminated through contractor settlements and negotiations to avoid lawsuits and ensure that the termination of these projects proceeds with some degree of efficiency. This has been termed 'controlled termination.' Tr. Vol. IV p. 913. Termination costs estimated for WNP 4 and 5 during 1982 are $94,639,000. For 1983-84 final termination and settlement costs are estimated to be an additional $120,360,000. Tr. Vol. IV p. 955; Staff Exhibit 3. Lower Valley and Fall River

voluntarily advanced 'loans' to WPPSS to assist in WPPSS cash flow for this controlled termination. Lower Valley 'loaned' WPPSS $305,618, and Fall River 'loaned' WPPSS $236,710; amounts which the utilities claim will be credited back at a later date against monies owed to WPPSS. Tr. Vol. I pgs. 425-428; Vol. IV p. 957.

19. The payments that Lower Valley and Fall River must make to WPPSS for WNP 4/5, aside from termination costs, are directly tied to the principal and interest payments on WPPSS bonds which financed the projects. The principal and interest payments, together with the prorata share of anticipated termination costs for Lower Valley and Fall River, will continue under the Participant's

Agreement through the year 2018 A.D. In total Lower Valley would ultimately pay approximately $62,250,000 and Fall River would ultimately pay WPPSS approximately $48,193,000. Tr. Vol. IV p. 956; Staff Exhibit 4. Placed in the perspective of all WPPSS costs for WNP 4/5, even these large amounts of money seem small. As previously noted WPPSS termination costs through 1984 are anticipated to be $214,999,000. Bond principal payments from 1989 to 2018 will amount to $2,250,000,000. Interest payments from 1982 to 2018 will amount to $4,972,282,000. Incredibly enough, the total bill for WNP 4/5 comes to $7,437,281,000. Tr. Vol. IV pgs. 955-960; Staff Exhibits 3 and 4. These are not estimates of what it would cost to

complete the projects, but actual costs associated with these two WPPSS projects which were only 16 to 20 percent complete when terminated. The estimated cost of completing WNP 5 alone was over $6 billion in December 1981. Tr. Vol. III p. 718.

20. Pacific Power financed its own participation in WNP 5. Through December 31, 1981, Pacific Power had an actual before tax investment of $99,092,000 in WNP 5. Tr. Vol. III p. 719; Pacific Exhibit 7, Table 7-1.

21. It is clear that no electric power has been generated or can be expected to be generated by these cancelled power plant projects. We cannot find any present or future benefit that will flow from the massive investment in

these projects to the consumers of Pacific Power, Lower Valley or Fall River.

THE USED AND USEFUL PRINCIPLE

The used and useful principle provides that only that utility plant which is currently used and useful in rendering utility service to the public shall be included in computing rate base and expenses recoverable in rates from the public.

W.S. 37-2-119 requires that the Commission consider "the property and business of any public utility, used and useful for the convenience of the public..." We understand this to mean that by law the Commission must focus on the assets used and useful in rendering service to the public, rather than the

capital invested in utility assets. We have concluded that in any case the principle ought to be applied by focusing on the assets involved in rendering service to the public. Otherwise utility consumers might find themselves supporting non-utility investments as well as utility investments - clearly a result which the law was enacted to avoid.

We reject the notion that the thing which is truly used and useful to consumers is the capital investment in the form of funds which require a return and not the capital assets which are used to provide the utility service. Union Electric Co., Docket No. U-558 (Iowa Commerce Commission (1975)). While it is true that a utility plant does cost money and that money is provided by investors,

it is the utility plant and not the money which generates electricity. By focusing on the capital rather than the asset side of the balance sheet, we would make an unfounded assumption that the assets purchased by the capital are used and useful, or we would be compelled to assume that investor owned public utilities are not subject to the same risks of loss that exist in the competitive arena. We will not make either of these assumptions.

Since no Commission should assume that all capital invested was for plant used and useful in rendering service to the public, testing such an assumption would always lead back to the asset or left-hand side of the balance sheet anyway. We prefer not to make such

an assumption and we find that the simplest, most direct way to apply the used and useful concept is to focus on the asset side of the balance sheet in the first instance. Policy and the law require focusing on utility facilities.

It appears, however, that a more fundamental reason we are asked to focus on the right-hand side of the balance sheet (a method known as the invested-capital or prudent-investment rate base) may be to allow a means of accommodating the assumption that investor owned public utilities should only bear the risk of loss from imprudent or fraudulent capital investments. For reasons which will be set out below we reject this assumption also. Our focus

then is upon the asset side of the balance sheet because this is the simplest, most direct and logical method for identifying those assets which are used and useful in rendering service to the public. If logic did not dictate that we focus on the assets in applying the principle then we believe W.S. 37-2-119 would require such a focus in the public interest.

The second element of the concept revolves around the requirement that the plant or property be 'used and useful for the convenience of the public.' We understand these words to refer to those capital assets which directly or indirectly are actually and currently used in providing utility service to the public.

In summary, the concept is best expressed by the question: "Are particular items of property used and useful in rendering service to the public?" The emphasis in the application of the concept is upon the identification and valuation of property and assets, and upon the determination whether those assets are currently used and useful in rendering service to the public. We believe our understanding of this basic public utility principle is one to which the parties to these proceedings subscribe. Tr. Vol. III p. 572-573.

CONSEQUENCES OF APPLYING THE USED AND USEFUL PRINCIPLE

22. If utility plant is used and useful in rendering service to the public then that plant will be included in rate

base and the utility will be allowed to earn a rate of return on that investment. Plant included in rate base is allowed to be depreciated or expensed over a period of years. Maintenance and other expenses related to capital plant are expensed as they occur. Conversely, if utility plant is not used and useful in rendering service to the public then application of the used and useful principle has the following consequences for rate making purposes:

1. Exclusion of the investment from rate base upon which rate of return is computed;

2. Denial of an amortized recovery of the investment; and

3. Denial of recovery of termination, maintenance, and other expenses related to the property in question.

Investors do not only risk an opportunity to earn a return on investment, but also any return of the investment itself and of those expenses related to the capital investment.

REASONS FOR APPLYING THE USED AND USEFUL PRINCIPLE

23. There are a number of reasons for applying this principle. First we believe the legislature has required its application. W.S. 37-2-119 provides that in conducting any investigation the Commission "may investigate, consider and determine such matters as the cost or

value, or both, of the property and business of any public utility, used and useful for the convenience of the public ***." The issue is raised whether the application of the "used and useful" principle is mandated by this statute or whether the use of the word "may" indicates that application of the principle is a matter of discretion with the Commission. We believe that the discretion given to the Commission by the Legislature is with respect to whether the Commission will use a cost or a fair value method or both for the valuation of rate base, and not whether the Commission will apply the used and useful principle.

While the Commission believes that the Legislature has mandated

application of the used and useful principle, we do not apply that principle here solely because of this reading and understanding of W.S. 37-2-119. We also apply this principle to the abandoned construction projects in question because we believe it is appropriate in the public interest. If we have discretion to apply the used and useful principle we exercise that discretion by applying the principle because the consuming public has not and will not receive any electrical service from these cancelled power projects. Regulation in the public interest requires that rates reflect only those costs and expenses related to facilities which serve the public. Tr. Vol. IV p. 962-966. The risk of loss from a failed investment falls upon the

investor, not the consumers of these utilities, and the risk taking by investor utilities does not shift because of a showing of management prudence. Losses may occur when management is prudent as well as when management is imprudent. We do not accept the proposition that because a public utility has a service obligation and its rates are regulated, it takes on a quasi-governmental role and immunizes itself from a risk of loss which investors in non-regulated companies incur.

The risk of loss to public utility investors is not lessened by the fact that a public utility incurs a service obligation. The service obligation merely recognizes the fact that an electric public utility, for all intents and

purposes, has a monopoly within a service area and it provides an essential modern service. The grant of a certificate of public convenience for a service area carries with it the obligation that service will be provided to those in the area which require it. The service obligation flows from the monopoly position the utility enjoys in providing an essential service to the public.

Regulation of rates also flows from the fact that public utilities operate more efficiently as monopolies, and the public interest thus requires both the most efficient method of providing essential services and protection from monopoly abuse. It does not follow that because utilities have a public service obligation and their rates are regulated,

public utility investors only incur the risk of capital investment loss when management is imprudent or engages in fraudulent activities.

24. We conclude that under the circumstances the application of the used and useful principle will result in the setting of just and reasonable rates because ratepayers should not be required to pay for facilities and related expenses which will not directly or indirectly provide electric service.

25. Pacific Power & Light is a publicly held corporation which is traded on the New York Stock Exchange. Lower Valley and Fall River are distribution level electric cooperatives whose membership is composed of its ratepayers. Despite the

differences between a publicly held corporation and a cooperative, the burden of risk bearing in these enterprises remains upon the investor, whether that investor is a stockholder or a cooperative member/ratepayer. Given the fact that electricity is an essential modern service it should also be observed that cooperative membership in Lower Valley or Fall River is not a purely voluntary matter as it is with Pacific Power & Light's stock and bond holders. Nevertheless a cooperative member's capital credits are at risk here.

26. In examining the reasons why we should exercise any discretion we may have in applying this principle, we have not relied solely upon the record. Whether or not as a matter of fact a

capital investment is used and useful is a matter which must be supported by the record. However, our understanding of the meaning and reasons why certain established utility principles exist, such as the used and useful principle, is not wholly dependent for its application upon an explanatory recitation in the record by one or more of the parties. The Commission believes it can, should, and sometimes must be able to draw upon its more than 22 years of collective experience, expertise, and regulatory judgment in defining and applying certain general and long established utility principles.

SUMMARY OF FINDINGS ON WPPSS PROJECTS

27. It is clear that no electric power has been generated or can presently be expected to be generated by WNP 4 and 5. The investment by WPPSS and Pacific in these projects is not and cannot be expected to be used and useful for the convenience of the public. We believe that each of these three public utilities must agree that this is the case. Tr. Vol. I p. 132; Tr. Vol. I p. 193, lines 2-5; Tr. Vol. III p. 572-579. We therefore conclude that Pacific's investment in WNP 5 should not be included in rate base for rate of return purposes, should not be recovered in rates through any period of investment amortization; and no termination costs or other costs associated with the WNP 5 should be included

in utility expenses recoverable from its Wyoming ratepayers.

28. We also conclude that Lower Valley and Fall River should not be permitted to recover in rates any payments due to WPPSS under the Participant's Agreement because any such payments would be for facilities which are not and will not be used and useful for the convenience of the public. The application of the used and useful principle of public utility ratemaking is not dependent upon the particular form of financial agreement to which the utility has committed itself. If this were the case the legislature's intent to have the used and useful principle applied would be easily circumvented. For ratemaking

purposes we are concerned with one essential question in this case. Is the facility for which the utility has guaranteed payment of a pro rata share of costs used and useful for the convenience of the public? The answer in this case is no. Therefore, application of the principle properly precludes the recovery from ratepayers of expenditures related to these cancelled power projects.

We recognize that there is a difference between Pacific Power which entered into an Ownership Agreement with WPPSS, and Lower Valley and Fall River which entered into a Participant's Agreement with WPPSS. Had WNP 5 become operational we would have allowed Pacific Power's ten percent ownership interest to

be included in rate base, and depreciation and other expenses would have been allowed. Under the Participant's Agreement WPPSS remained the owner and the participants would have expensed the cost of electricity purchased from WPPSS. This cost, however, would have included an amortization of the investment, interest payments on WPPSS bonds, and all operations and maintenance expenses. Since WNP 4/5 were not completed, however, Lower Valley and Fall River are obligated to WPPSS under the Participant's Agreement to make payments for termination expenses, and bond principal and interest payments. Their financial obligation is no different under the Participant's Agreement than it

would have been under an ownership agreement. While we recognize that there is a distinction between the financial arrangement entered into by Lower Valley and Fall River and that entered into by Pacific Power, we believe that for purposes of applying the used and useful principle it is a distinction without a difference. The intent of the legislature to have the principle applied, and our belief that it should be applied, ought not be affected by the form of the financing agreement when the ultimate financial obligation is the same. Rural Electric Co. v. State Board of Equalization, 120 P.2d 741, reh. den. 122 P.2d 189 (Wyo. 1942); Tri-County Electric Association v. City of Gillette, 584 P.2d 995 (Wyo. 1978).

FINDINGS ON PEBBLE SPRINGS

29. Pebble Springs was to be a two-unit nuclear generating station with a net electrical rating for each unit of 1260 megawatts. It was to be located in Gilliam County, Oregon, approximately four miles southeast of Arlington. Ownership was divided among Portland General Electric Company (PGE), Puget Sound Power and Light Company, and Pacific, in 47.1 percent, 23.5 percent and 29.4 percent shares respectively. Tr. Vol. II p. 450. In October 1974 Pacific agreed to participate in the Pebble Springs project. Seven and one-half years later in April 1982, PGE announced the termination of the project by withdrawing its site certificate application. Tr. Vol. III p. 673. The estimated cost of

completion of Pebble Springs had risen from $650 million in May 1973 to more than $5 billion at the time of hearing in July 1982. Tr. Vol. III p. 673-675. Although more than $200 million was invested in this project no actual construction other than site preparation ever commenced. Tr. Vol. III p. 531. No electric power has been generated or can presently be expected to be generated by this cancelled power plant project. The investment by Pacific and its partners in the Pebble Springs project is not used and useful for the convenience of the public. We believe that Pacific must agree that this is the case. Tr. Vol. III p. 572-579. Our prior discussion of the reasons for applying the used and

useful principle is incorporated by reference here. In summary, the legislative mandate of W.S. 37-2-119 requires, and the unanimous judgment of the Commission compels the application of the used and useful principle in establishing just and reasonable rates under these circumstances. We therefore conclude that Pacific's investment in this cancelled power project should not be included in rate base for rate of return purposes, and should not be recovered in rates through any period of investment amortization. Neither should any termination costs or other costs associated with the project be included in utility expenses recoverable from Pacific's Wyoming ratepayers.

OTHER FINDINGS

30. The utilities contend that if they were prudent they should be permitted to recover from ratepayers their investment and related financial obligations. We have indicated why we believe that application of the used and useful principle is required and appropriate. Application of this principle makes it unnecessary to decide whether or not these utilities were prudent in their decision making, participation, and management of these cancelled power plant projects.

31. To the extent any that prior decisions of the Commission are in conflict with this decision, this decision should be considered controlling and definitive. Never before have we been

asked to thoroughly explore the meaning and application of the used and useful principle in such depth. In this case we have not been asked to consider the application of the principle to power plants or capital facilities which have been operational but are abandoned or superceded before being fully depreciated. That is a different factual situation which might require a different result, as was the case in Docket 9454 Sub 11 when we allowed Pacific Power to recover the unamortized balance of its extraordinary property losses from the early retirement of the Dave Johnson Plant mechanical flue gas stacks. The premature retirement in that case was required by changes in Wyoming's

environmental air quality standards which forced replacement of the stacks.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Pacific Power & Light Company is hereby denied, now and in the future, the opportunity to recover in rates from its Wyoming jurisdictional consumers its investment and expenses related to the cancelled and abandoned power plant projects known as WNP 5 and Pebble Springs. These investments shall be excluded from the computation of rate base in any future rate proceeding before this Commission.

2. Lower Valley Power & Light Company and Fall River Rural Electric Company are hereby denied, now and in the future, the opportunity to recover in

rates from their Wyoming jurisdictional consumers any expenses related to their obligations under the Participant's Agreement with the Washington Public Power Supply System for the cancelled and abandoned power plant projects known as WNP 4 and WNP 5.

3. This order is effective immediately.

MADE and ENTERED at Cheyenne, Wyoming this 2nd day of December, 1982.

PUBLIC SERVICE COMMISSION OF WYOMING

JOHN R. SMYTH

John R. Smyth, Chairman

G. KEITH OSBORN

G. Keith Osborn, Commissioner

C. E. JOHNSON

C. E. Johnson, Commissioner

(SEAL)

ATTEST:

ALEX J. ELIOPULOS

ALEX J. ELIOPULOS, Secretary

IN THE CIRCUIT COURT OF COLE COUNTY
MISSOURI

STATE OF MISSOURI, ex rel. UNION ELECTRIC COMPANY, A Missouri corporation, Relator,	)	
vs.	)	
PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, Respondent,	)	
and	)	Case No. CV 183-1064cc Division No. II
PUBLIC COUNSEL FOR THE STATE OF MISSOURI	)	
and	)	
MISSOURI PUBLIC INTEREST RESEARCH GROUP, Intervenor-Respondents.	)	

ORDER

This case has been submitted to the Court on transcript and exhibits before the Missouri Public Service Commission ("Commission"), in Commission Case No. ER-83-163.

The parties hereto have filed with the Court briefs and suggested findings of fact and conclusions of law, and the arguments of counsel having been heard, now therefore, on the 16th day of April 1984, the Court having considered this matter and being fully advised in the premises, finds and determines as follows:

FINDINGS OF FACT

On December 3, 1982, Union Electric Company ("Company") filed revised tariffs with the Commission for an annual increase in electric rates of approximately $122,000,000. Before the effective date of the new rates, the Commission duly suspended the proposed tariffs and set the matter for formal hearings. Various groups were parties to

the proceedings before the Commission including the Missouri Public Interest Research Group ("MoPirg") and the Office of the Public Counsel ("Public Counsel").

A Stipulation and Agreement was approved by the Commission on July 6, 1983, providing for an increase in gross annual revenues of $30,500,000. The Stipulation and Agreement provided in part that it was intentionally silent as to rate of return and that the issue of the recovery of the costs associated with the cancelled Callaway II nuclear facility was not resolved but was left to be resolved after hearing by the Commission.

Hearings on the issue of the recovery of the costs associated with the cancelled Callaway II nuclear facility were held in Jefferson City beginning

August 24 and concluding on August 29, 1983. The Company and the Commission Staff submitted testimony and exhibits and were subject to cross examination by all parties.

Union Electric is an electrical corporation doing business as a public utility within the State of Missouri. Union Electric cancelled the Callaway II nuclear plant in October of 1981. There is no dispute among the parties to this review that the Callaway II nuclear facility has not provided, is not now providing, and will never provide electrical service to Union Electric's Missouri customers.

In its Report and Order dated October 21, 1983, the Commission ruled

that Section 393.135, RSMo 1978 (Proposition 1) barred the recovery through the rates to be charged by Union Electric of the costs associated with the construction of the Callaway II nuclear facility. The Commission did not reach the issues of whether under the facts of the case, recovery of the Callaway II costs was desirable and reasonable under general ratemaking principles, the amount of cancellation costs attributable to Callaway II, the amortization period, if any, or proposed adjustments with respect to APUDC settlements and deferred taxes. Thereafter, Relator timely filed an Application for Rehearing with the Commission, alleging that the Commission

erred in denying the costs. The Application for Rehearing was denied by the Commission.

The only issues presented to this Court are whether Union Electric is prohibited from recovering the costs associated with the construction of the Callaway II nuclear facility by Section 393.135, RSMo 1978, and, if so, whether the operation of that statute denying recovery is permitted under the United States and the Missouri constitutions and whether the Commission properly excluded Exhibit 42 offered by Union Electric.

CONCLUSIONS OF LAW

1. The Court has jurisdiction in this case pursuant to Section 386.510 RSMo 1978.

2. The Court concludes that Section 393.135 RSMo 1978, prohibits Union Electric from recovering the costs associated with the construction of the cancelled Callaway II nuclear facility through its rates charged to Missouri customers. That section of the Revised Statutes of Missouri clearly and unambiguously prohibits any charge based on the costs of construction in progress and, dispositive of this issue, any charge based on "... <u>any other cost associated with owning, operating, maintaining, or financing any property before it is fully operational and used for service</u>."

3. The Court concludes that the operation of Section 393.135 in prohibiting the recovery by Union Electric of the costs associated with the construction of

the cancelled Callaway II nuclear facility does not violate the due process clauses of the United States and Missouri constitutions. Cleveland Electric Illuminating Company v. Public Utilities Commission of Ohio, 104 S Ct 47 (1983).

4. The Court concludes that the Order of the Public Service Commission does not violate the equal protection clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 2 of the Constitution of Missouri. Williamson v. Lee Optical Company, 348 US 483 (1955); City of St. Louis v. Liberman, 547 SW2d 452 (Mo banc 1977); McClellan v. Kansas City, 379 SW2d 500 (Mo banc 1964).

5. The Court concludes that the Order of the Public Service Commission

properly excluded from evidence Exhibit 42, proffered by Union Electric.

6. The Court concludes that the Order of the Public Service Commission is supported by competent and substantial evidence and is reasonable and lawful in all respects.

WHEREFORE, it is Ordered, Adjudged, and Decreed, that the October 21, 1983, Order of the Commission is affirmed in all respects.

ss/Bryron L. Kinder
Byron L. Kinder
Circuit Judge, Division II

Dated: April 16, 1984

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company for an Emergency Increase in Rates and Charges for Electric Service	)))))	Case No. 81-898-EL-AEM

OPINION AND ORDER

The Commission, coming now to consider the application for emergency rate relief filed by Ohio Edison Company on July 30, 1981, pursuant to Section 4909.16, Revised Code, the exhibits filed therewith, and the Stipulation and Recommendation signed by its Staff and by other parties as described below; and being otherwise fully advised in the premises, hereby issues its Opinion and Order.

APPEARANCES

Under the provisions of the Stipulation and Recommendation discussed below, the parties to the Company's permanent rate application (Case No. 80-1139-EL-AIR) and the applicant for intervention, E. Ray Davis et al., wish to be treated as intervenors in this emergency case. Those parties, as well as the Staff of this Commission, make the following appearances:

Mr. Russell J. Spetrino, Miss Frances McGovern and Mr. Anthony J. Alexander, 76 South Main Street, Akron, Ohio 44308, on behalf of Ohio Edison Company.

Mr. William J. Brown, Attorney General, by Mr. Marvin I. Rosnik and Mr. James R. Bacha, Assistant Attorneys

General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the Staff of the Public Utilities Commission of Ohio.

Mr. Richard M. Fanelly, Special Legal Counsel, for the City of Akron, 621 Centran Building, Akron, Ohio 44308, on behalf of the City of Akron.

Mr. Edward M. Zaleski, Lorain Law Director, by Mr. Stephen B. Angel, Special Utilities Counsel, 200 West Erie Avenue, Lorain, Ohio 44052, on behalf of the City of Lorain.

Mr. William A. Spratley, Consumers' Counsel, by Mr. Richard P. Rosenberry, Associate Consumers' Counsel, 137 East State Street, Columbus, Ohio 43215, on behalf of the Residential Consumers of Ohio Edison Company.

Messrs. Steer, Strauss, White & Tobias, by Mr. Theodore K. High, 2208 Central Trust Tower, Cincinnati, Ohio 45202 and Mr. John A. DiNardo, Assistant Counsel, P.O. Box 600, Middletown, Ohio 45042, on behalf of Armco Inc.

Mr. Wayne L. Emery and Mr. Kenneth R. Pepperney, 600 Grant Street - Room 1569, Pittsburgh, Pennsylvania 15230, on behalf of United States Steel Corporation.

Bell & Clevenger Co., L.P.A., by Mr. Langdon D. Bell, 21 East State Street, Columbus, Ohio 43215, on behalf of General Motors Corporation and PPG Industries, Inc.

Messrs. Muldoon, Pemberton & Ferris, by Mr. Boyd B. Morris, 50 West

Broad Street, Columbus, Ohio 43215, on behalf of Ray Davis et al.

Introduction:

Ohio Edison Company (hereinafter referred to as the applicant, the company, or Ohio Edison) is an Ohio corporation engaged in the generation, transmission and distribution of electric energy and is a public utility and an electric light company within the definitions of Sections 4905.02 and 4905.03(A)(4), Revised Code. On July 30, 1981, the company filed the instant application pursuant to Section 4909.16, Revised Code, praying that the Commission find an emergency exists as to the company, and, to prevent injury to the business or interests of the public or of the company, that the company be authorized

to place into effect on bills rendered on and after August 1, 1981, an increase of $90,000,000 on an annualized basis over the revenue at current rates, including the provision for recovery of fuel costs, based on the six months actual-six months estimated billing determinants as set out in the company's E-4 schedules in its application for a permanent rate increase in Case No. 80-1139-EL-AIR. The temporary rate would apply to all current customer classes.

On December 1, 1980, the company began the statutory process of seeking permanent rate increases by giving notice of its intention to file an application for an increase in rates pursuant to Section 4909.43(B), Revised Code. The notices were docketed under

Case No. 80-1139-EL-AIR. The increase sought in the permanent rate case amounts to approximately $138,000,000 over currently authorized revenues based on a test year ending August 31, 1981, or approximately $139,000,000 based on a fully forecasted test year ending June 30, 1982. Ohio Edison proposed that the temporary increase remain in effect until a permanent increase is authorized by the Commission. An Opinion and Order in the permanent case is expected to be issued on or about December 1, 1981.

Ohio Edison alleges that its poor financial condition was unexpectedly and extensively exacerbated by the prospective need to write off $52,495,829 as of September 30, 1981, as a result of the decision on July 15, 1981, of the

Ohio Supreme Court in Consumers' Counsel v. Pub. Util. Comm., 67 Ohio St. 2d 153, that, while the Court did not disturb the finding of the Commission that the decision of the CAPCO companies to embark on the construction of the nuclear units and the decision to terminate construction were reasonable, given the uncertainties that now attend the construction of nuclear units and the intervening decline in growth expectations, the costs incurred by The Cleveland Electric Illuminating Company in conjunction with the termination of construction of the four units were not properly includable for rate purposes as ordinary operating expenses under Section 4909.15(A)(4), Revised Code. Pursuant to this Commission's Opinion and Order in Case No.

80-141-EL-AIR, Ohio Edison is currently recovering an amount required to permit amortization of 1/10 of the estimated jurisdictional cost, net of tax, incurred by Ohio Edison in conjunction with termination of the same four units. The circumstances in the Consumers' Counsel decision, supra, are so similar as to suggest that allowance to Ohio Edison, the principal owner of the four units, of its share of the costs of the units will also be disallowed. Its independent auditors, which have already qualified their opinion with respect to the Company's earnings as of June 30, 1981, have advised that, in accordance with generally accepted accounting principles, the entire unamortized loss to Ohio Edison must be written off if the decision

stands. As far as the investment community is concerned, this imminent loss has already taken place.

The company also alleges that following the decision in Consumers' Counsel, supra, it was obliged to withdraw its offering of $75,000,000 in first mortgage bonds which had already been priced at a 16-7/8% coupon rate to aid it in paying off $150,000,000 in 10% bonds due August 1, 1981. The company was also forced to cancel a scheduled August sale of 7,000,000 shares of common stock intended to produce approximately $84,000,000. The write-off of the loss will immediately reduce, dollar for dollar, the unrestricted retained earnings of the company available to pay common stock dividends and further reduce the

company's already low common equity component of permanent capitalization which is already increasing the risk to common stock investors and the cost of common capital to the company. In its present circumstances the company is virtually precluded from gaining any access to the market for the permanent capital financings and is forced to rely on costly short-term bank borrowings. The amount of such borrowings is limited by the company's charter and will be at the limit by the end of 1981 if emergency relief is not granted. Access to permanent capital is critical to the ability of the company to provide adequate and reliable service to customers and something approaching $235,000,000 in proceeds from external financing with

permanent capital is needed still in 1981. Given the company's ongoing need for access to the public markets for capital and the practical inability to "catch-up" with deferred financings added to what will be required to be scheduled in 1982, the company must receive substantial emergency relief if it is to be able to attempt to issue new permanent capital in 1981 before short-term unsecured capital limitations are reached. While it is not so much indenture and charter limitations limiting access to the capital market as the perception of the market of the unsettling effect on Ohio Edison of having to write off an immense loss immediately instead of amortization of the amount over ten years, the company also states that it

has no interest and dividend coverage leeway under its charter that will permit issuance of preferred stock and that its interest coverage required under its indenture to be at least 2X including coverage of interest on any new issue, is currently 2.07. Perceiving the potential impact on the company of its inability to gain access to the market for permanent capital, the intervenors in the company's pending permanent rate case, Case No. 80-1139-EL-AIR, recognized that accelerated recovery of an agreed sum of $90,000,000 to settle issues as to revenue in the pending permanent rate case, might serve to alleviate the company's financial circumstances.

Attached to the company's application for temporary emergency rate

relief, as Exhibit A, is a Stipulation and Recommendation signed by all parties who are intervenors in the company's permanent rate case, as well as by a party applying to intervene. The Stipulation and Recommendation is also signed on behalf of the Staff of this Commission respecting certain matters stipulated and recommended therein.

The Stipulation recommends, inter alia, that Ohio Edison be permitted to recover on bills rendered on and after August 1, 1981, the sum of $90,000,000, which does not include any continued amortization of costs associated with the construction and subsequent termination of the four generating units, in full settlement of issues as to revenue requirements in the company's pending

permanent rate case. Since, however, it was judged that the permanent rate case cannot be finally adjudged until after issuance in that case of a Staff Report of Investigation, service of the report, a thirty day period to receive objections and a hearing, the parties also agreed that the company should file an application for emergency relief to effectuate the Stipulation and Recommendation, that the emergency increase should be effective on bills rendered on and after August 1, 1981, that, as evidenced by information and data provided in the company's emergency application (previewed by parties), the company is in a financial emergency as that term has been used by the Commission in prior decisions, that the magnitude of relief agreed to is

not unreasonable as emergency relief, given the company's present situation and further financing requirements and is less than the company states it otherwise would have requested in the absence of agreement of the parties, and that the emergency rates should be the rates set out in Exhibit No. 1 to the Stipulation and Recommendation.

The Stipulation also recommends the severing and separate determination of issues of revenue distribution and rate design in Case No. 80-1139-EL-AIR and, as between the Office of Consumers' Counsel and Ohio Edison, calls for severing and separately determining, after a special hearing, whether the Commission should order a management audit pursuant to Section 4909.154, Revised Code, as

requested by the Consumers' Counsel in a pending motion in Case No. 80-1139-EL-AIR.

The Stipulation further provides that it is not to be binding upon the parties in any other proceedings than those which are required to effectuate the Stipulation.

Finally, it was agreed that should the Commission reject all or any part of the agreement and recommendations offered therein, the Stipulation and Recommendation shall be of no force and effect.

Commission Review and Discussion:

The Commission's authority to order modifications of existing rates on a temporary basis arises under Section

4909.16, Revised Code, which provides as follows:

> When the public utilities commission deems it necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency to be judged by the commission, it may temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates, schedules, or order relating to or affecting any public utility or part of any public utility in this state. Rates so made by the commission shall apply to one or more of the public utilities in this state, or to any portion thereof, as is directed by the commission, and shall take effect at such time as the commission prescribes.

The Supreme Court of Ohio has consistently construed this statute as vesting the Commission with broad discretionary power in determining when an emergency exists and in tailoring a

remedy which will enable the public utility concerned to meet that emergency. Cambridge v. PUCO (1953), 159 Ohio St. 88; Manufacturer's Light & Heat Co. v. PUCO (1955), 163 Ohio St. 78.

The Commission is guided by the following considerations when confronted with a request for emergency rate relief: (a) emergency rate relief is "extraordinary" in nature; (b) the existence of an "emergency" is a condition precedent to temporary rate relief; (c) temporary rate relief will be granted only at the "minimum level" necessary to avert or relieve the emergency; (d) the applicant's evidence will be reviewed with the "strictest scrutiny" and that evidence must "clearly and convincingly"

demonstrate the presence of "extraordinary circumstances" which constitute a genuine emergency situation; and

(e) emergency rate relief will not be granted under Section 4909.16, Revised Code, if the emergency request was filed merely to circumvent and as a substitute for permanent rate relief under Section 4909.18, Revised Code.

The primary question is simply whether, absent temporary rate relief, the utility's ability to render service will be impaired or the utility will be financially imperiled. If the utility fails to sustain its burden of proof on this issue, the Commission's inquiry is at an end. See Toledo Edison, Case No. 76-439-EL-AEM (Opinion and Order, September 8, 1976).

The Commission is persuaded and finds that the requisite considerations have been met in this case. Moreover, it has never had before it a case in which the timing of relief was of such grave importance and in which parties representing a diversity of interests and viewpoints and the Staff of the Commission have all agreed not merely to the level of temporary emergency relief needed but also as to the need to grant emergency relief forthwith and to make it immediately effective.

Notwithstanding the swiftness of the Commission's action, it is not ill-considered in the circumstances.

The company has supplied as Exhibit B a projected income statement for 1981, a projected cash flow statement

for 1981, and a measurement of unsecured indebtedness as against charter limitations on that indebtedness for the same period. The data, as to which no question of reliability has been raised and which is based in substantial part on actual data recorded on the books of the company and on the known obligation of the company to write off $52,495,829 as of September 30, 1981, on the advice of the company's independent auditors, reveals that a $150,000,000 10% bond issue must be refunded August 1, 1981, and must be replaced in the company's existing circumstances with high cost, short term debt approximating a cost rate of 20%, that the estimated direct short term indebtedness will range from $289,000,000 to $382,000,000 between

August and December, 1981, and that by year end 1981, the company will have effectively reached the limitation under its charter relating to unsecured indebtedness absent permanent financing to partially relieve this burden. Moreover, the information indicates that the write-off of almost $52.5 million may jeopardize the continued stock dividend payment of the company and thus indirectly serve as a practical impediment to the company in raising permanent debt or equity capital for its on-going construction program, which includes funding for the environmental control program underway.

The Commission is, of course, not bound by the Stipulation and Recommendation presented to it by its Staff

and the parties. However, a joint recommendation made by the Staff and the parties in circumstances such as these is entitled to careful consideration and should not be lightly regarded. It is impressive that there is unanimous concurrence in the conclusion that $90,000,000 in emergency relief is immediately needed. While ordinarily in emergency cases the Staff is not able to conduct as detailed an investigation as it does in permanent cases, in this case, the Staff has been investigating the Company's financial condition in connection with the permanent application for nearly five months. Under these circumstances, the Staff's stipulation and recommendation regarding the need for emergency relief is even more persuasive.

It is not the custom of the Commission to act without prior hearing and the taking of testimony in emergency cases nor would it ever do so except in extraordinary circumstances. In the opinion of the Commission, however, extraordinary circumstances exist in this case to justify such a course of action, including not merely the urgency of the need for emergency action but also the effective participation of all parties normally taking part in Ohio Edison rate cases. Moreover, the Commission believes summary action is lawful. Section 4909.16, Revised Code, not only does not require a hearing, but the fact that no provision was made by the legislature for a hearing may well be an acknowledgment that the ability of the Commission to act

promptly in emergency circumstances is an essential feature of its authority under Section 4909.16, Revised Code, for it cannot be doubted that in some circumstances the best means of containing an emergency at overall lowest cost to customers is to grant relief as swiftly as possible. Accordingly, the Commission concludes that a temporary emergency increase should be granted forthwith. Moreover, the existence of an emergency cannot be in doubt. It is clear that the funds needed by Ohio Edison to finance the enterprise must come from external sources under present rates. It is equally clear that undue reliance by the company on short-term unsecured borrowing, particularly at the high cost prevailing today, cannot only create a

crisis of investor confidence but, in so doing, reduce the future ability of the company to finance essential requirements at reasonable cost to ratepayers.

When, moreover, there is the sudden occurrence of an unexpected event that has forced the withdrawal of proposed issues of bonds and common stock and has destroyed, for all practical purposes, the ability of the company to resort to the market for permanent financing, the Commission is bound to recognize in the interests of ratepayers that untoward measures to cope with the emergency are in order. It can but hope that prompt relief, which will maximize receipts in 1981, the year of extraordinary loss, and that the level of relief granted, as requested by the company and

concurred in by the Staff and all parties, will prove to be adequate.

Upon review of the evidence supplied by the company and the Stipulation and Recommendation of the Staff and the parties, the Commission finds that an emergency exists which, without rate relief, will imperil the company's ability to provide adequate and reliable electric service consistent with its duty as a public utility. We accept the recommendations to the Commission in the Stipulation and Recommendation in so far as they relate to the granting of emergency relief. While the Stipulation and Recommendation also encompasses stipulations and recommendations relating to the permanent rate case, which was used as a vehicle to establish a proper level of

interim emergency relief, those matters must be finally reviewed and determined in the permanent rate case, Case No. 80-1139-EL-AIR. Only the recommendation in the Stipulation and Recommendation that a hearing should be held on whether the Commission should order a management audit as requested in Case No. 80-1139-EL-AIR can be addressed at this time. In light of the allegations contained in the company's emergency application and based on the motion for a management audit filed by the Office of Consumer's Counsel in Case No. 80-1139-EL-AIR, the Commission believes that a management audit should be conducted and will so order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1) Ohio Edison Company is an Ohio corporation and a public utility engaged

in the construction of generating, transmission, distribution and other facilities required to furnish adequate and reliable supplies of energy to its customers now and in the future.

2) The company is a public utility as defined in Sections 4905.02 and 4905.03, Revised Code, and is subject to the jurisdiction of the Commission pursuant to Sections 4905.04, 4905.05 and 4905.06, Revised Code.

3) The applicant filed the instant application for emergency rate relief pursuant to the provisions of Section 4909.16, Revised Code, on July 30, 1981.

4) The inability of the company to obtain permanent capital and to rely entirely on short-term unsecured borrowings at high cost and in amounts

approaching the company's charter limitations on its ability to raise such capital, will injure the business or interests of the public and the company and constitutes an emergency within the meaning of Section 4909.16, Revised Code.

5) The immediate suspension of existing rates and authorization to the company to file new rates producing a $90,000,000 increase effective immediately on bills rendered on and after August 1, 1981, will ameliorate the emergency.

6) Absent such a level of emergency rate relief effective immediately, the ability of the company to render adequate service at reasonable cost to its customers will be impaired. The company's

financial integrity will be jeopardized and the public interest will be injured.

7) An increase in Ohio Edison's current rates by $90,000,000 on an annualized basis effective on bills rendered on and after August 1, 1981, is the minimum amount necessary to enable the company to meet the emergency condition.

8) The Commission, pursuant to Section 4909.16, Revised Code, has the authority under the circumstances herein to grant emergency rate relief as to all rates established by this Commission.

9) Evidence of sufficient reliability was presented to allow the Commission to determine whether the company's circumstances constitute an emergency.

ORDER:

It is, therefore,

ORDERED, That the company be authorized to place in effect the rate schedule attached to the Stipulation and Recommendation as Exhibit No. 1. Such rates shall remain in effect until the Commission orders otherwise or new rates go into effect by operation of law. It is, further,

ORDERED, That the company shall file as soon as possible three (3) original revised rate schedules reflecting the rates authorized herein. It is, further,

ORDERED, That these revised sheets be clearly designated as "emergency and temporary." It is, further,

ORDERED, That the effective date of such schedules shall be August 1,

1981, and will be applicable to bills rendered on and after that date. It is, further,

ORDERED, That there shall be conducted a management audit of the company. The Commission will issue an appropriate order in the near future instituting such a procedure. It is, further,

ORDERED, That a copy of this Opinion and Order be served on all those having entered appearances in this matter, as listed above.

THE PUBLIC UTILITIES COMMISSION OF OHIO

ss/ _____
(Chairman)

ss/ _____

ss/ _____
(Commissioners)

Entered in the Journal
July 31, 1981

A True Copy

ss/_____
David N. Polk
Secretary

No. 79-1929
STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT III

WISCONSIN PUBLIC SERVICE CORPORATION,

Petitioner-Respondent,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

Appellant.

APPEAL from an order[1] of the circuit court for Brown County: ROBERT J. PARINS, Judge. Reversed.

Before Foley, P.J., Dean and Cane, JJ.

DEAN, J. The Public Service Commission of Wisconsin appeals from an order that remands a March 2, 1979, PSC order (hereinafter the Order) that directs WPS to place on its books certain

expenditures incurred in seeking authority to construct a two-unit nuclear power generating facility in the Town of Koshkonong in Jefferson County. The Order was separate and distinct from any rate proceeding. The circuit court determined that the PSC's method of accounting, which precluded the expenses from appearing as operating expenses on the books of the utilities in any rate case test year, was inconsistent with the PSC's finding that the expenses were prudently made and not chargeable to the stockholders. We conclude that the PSC did not abuse its discretionary authority to direct the manner and form in which the utilities keep their books and that the Order does not confiscate utility property. We therefore reverse the order

of the trial court and reinstate the PSC Order directing the utilities to write off $7.5 million in nuclear power plant development costs.

On July 10, 1974, Wisconsin Public Service Corporation and three other utilities submitted to the PSC a joint application for authority to construct and put into operation power generating facilities at Koshkonong, Wisconsin. In 1977, the applicants withdrew their application with the consent of the PSC. Prior to withdrawal, the utilities spent $34,898.362.29 developing their application, an amount which they expected to capitalize when the project was completed. The costs were accrued, and the expenditures did not appear on

the utilities' books as operating expenses during the years 1974 to 1977.

The PSC held hearings relating to the accounting treatment of the costs while the Koshkonong application was pending and after the application's withdrawal. The proceedings culminated in the PSC's Order of March 2, 1979, which directed the accounting of the $33,881.244.86 in expenditures.[2] WPS contested the accounting treatment with respect to its share of $7,526,324.66 in expenditures, and the other three applicants[3] join WPS on appeal as intervenors.

We consider first whether the case is moot because WPS has submitted and received consideration on a rate increase application subsequent to the March 2, 1979, Order.[4] A case is moot

when "a determination is sought which, when made, cannot have any practical effect upon an existing controversy."[5] In Wisconsin Association of Manufacturers & Commerce, Inc. v. PSC, 100 Wis2d 300, 301 NW2d 247 (1981), a controversy involving a rate order was found moot because a subsequent rate order had been entered. This case, however, involves an accounting order. If we were to affirm , the case would be remanded to the PSC to make its order consistent with its findings as directed by the trial court. WPS contends that the PSC can, and does, order utilities to retroactively adjust their books to conform to an accounting order.[6] The PSC also could order the $7.5 million in expenditures amortized over a period of years to commence at the

beginning of the next rate case test year.[7] If upon remand the PSC ordered the expenditures removed from the account to which they were charged and charged to that account to commence with the beginning of the next rate case test year, then the expenses would appear as reasonable and prudent expenses in addition to all other reasonable and prudent expenses in the rate case test year. At that time, WPS could request higher rates than would otherwise be approved to cover its costs relating to the $7.5 million in expenditures. We conclude that the case is not moot.

We turn to the merits of the case. The legislature has delegated to the PSC the power to prescribe the manner and form in which utilities keep their

books and records.[8] The legislature has provided for review in the circuit court of such an administrative decision.[9] Section 227.20(8), Stats., required the circuit court to:

> reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgement for that of the agency on an issued of discretion.[10]

The legislature provided for further review of the final judgment of the circuit court by appeal to the court of appeals.[11] On appeal, this court is only

to determine whether the circuit court erred in its determination.[12]

When the circuit court concluded that the Order was inconsistent with its findings, it concluded that the PSC's action was not explained to the satisfaction of the court. WPS also argues that the Order is inconsistent with prior agency practice and is otherwise is violation of constitutional provision. We first consider whether the circuit court correctly concluded that the Order inadequately justifies its action and then consider WPS's arguments. We conclude that the Order was not inconsistent with its findings, that the Order adquately justified its exercise of discretion, and that the Order did not confiscate utility property.

To determine whether the circuit court erred, we consider the basis for the circuit court's decision. The circuit court reviewed the record and determined that substantial evidence supported findings made by the PSC in the Order. The circuit court accepted as fact that the monies were spent and that the expenditures had no value to the utilities or ratepayers. More importantly, it accepted that the expenditures were reasonably and prudently made in the planning for customer service and that, consequently, they were not "to be charged against the stockholders on the books of the company." The court also accepted that the write-off would reduce WPS earnings per share by $.06, in

comparison to 1978 annual earnings per share of $2.54.

The circuit court determined that the Order amortized the expense in twelve months and that, as a practical matter, the write-off would not permit expenses to appear on the utilities' books in a rate case test year. The court also determined that the expenditures were not of the type routinely written off and that these types of expenditures usually were amortized over periods of time longer than one year. In addition, the court determined that the PSC had policy reasons for choosing a one-year period, including (1) that sound, conservative accounting practice requires prompt early removal of items without value from the utilities' books;

(2) that the impact on stockholders was not significant; (3) that tax benefits reduced the impact of losses on stockholders; (4) that the PSC anticipated introducing a policy of treating precertification planning expenditures as operating expenses; and (5) that a change of policy concurrent with longer term amortizastion of past expenditures would cumulatively burden current ratepayers. In spite of these policy reasons for one-year amortization, the circuit court concluded that the Order was inconsistent with its findings because, although the expenditures were "not to be charged to stockholders," the practical effect of the write-off, which precluded recovery in rates, was to place the entire burden of the expenditures on stockholders.[13]

We agree with the circuit court that the PSC chose one-year amortization periods for sound policy reasons, but we conclude that the circuit court erred when it concluded that the one-year amortization period was inconsistent with the Order's findings. In the Order, the PSC stated: "The fact that ... [the $7.5 million in expenditures] were not found imprudent means that they will not be charged against the stockholders on the books of the company." [Emphasis supplied.] The circuit court reduced this statement to a finding that the expenditures were not be "charged against the stockholders."

The circuit court created the inconsistency that it found troublesome by reducing "charged against stockholders

on the books of the company" to "charged against stockholders." The expenditures were not "charged against stockholders on the books of the company"; a comparison of the treatment of $45,228.82 in imprudent advertising expenditures that were "charged against stockholders on the books of the company" and the treatment of the $7.5 million in expenditures supports this conclusion.

Prior to the Order, both the $45,000 in advertising expenditures and the $7.50 million in other expenditures were accrued in account 186, miscellaneous deferred debits.[14] When amortized, the $7.5 million in expenditures were transferred to account 407, classifying them as operating expenses. In contrast, the order transferred the $45,000 worth

of advertising expenses, which were imprudent and chargeable to stockholders, to account 426, classifying them as "miscellaneous income deduction." There is an ultimate difference in treatment. On the one hand, if any month in which the $7.5 million in expenditures appeared on the books had been part of a rate case test year, these expenses would have been included in those expenses used to estimate the cost of operation for the purpose of establishing rates. On the other hand, if the $45,000 had been on the books in a rate case test year, the expenses would not be included in operating costs upon which rates would be based. We conclude that the $7.5 million in expenditures were not charged against

the stockholders on the books of the company because of this difference.

WPS argues that the Order is arbitrary and capricious for reasons other than the reason upon which the circuit court based its order.[15] WPS contends that the PSC practice was to amortize losses over periods longer than one year. If amortized over three, five or ten years, then the losses would appear in a rate case test year, and the utilities would subsequently have the opportunity to recover losses in rates. WPS concludes that the Order is inconsistent with prior agency practice because it precluded recovery in rates.

WPS cites numerous other cases and orders to establish that PSC practice is to amortize losses over periods longer

than one year. The examples include PSC orders involving other types of losses,[16] other orders in the same docket,[17] and orders made by other public service commissions relating to precertification expenditures from abandoned projects.[18] We do not agree that such examples establish PSC practice in this type of case.

At the same time, the one-year write-off is an express deviation from the past practice, which capitalized such expenses in the cost of completed projects, and is different from the expressly anticipated policy of treating precertification expenditures as operating expenses.

The PSC has authority to direct the manner and form in which the utilities maintain their books. Section

196.06, Stats. The circuit court is authorized to reverse or remand an order exercising that authority if an order is inconsistent with agency practice, but only if the deviation is not explained to the satisfaction of the court. Moreover, the statute directs the court not to substitute its judgment for that of the agency. Section 227.20(8), Stats. The circuit court recognized that the PSC justified its choice of a one-year amortization period with policy reasons. We concur with the circuit court that the policy reasons stated in the Order are sound. In light of the policy reasons supporting the PSC's exercise of discretion, the Order should not be reversed or remanded because it is inconsistent with prior agency practice.

WPS also contends that the Order violates fourteenth amendment due process. WPS phrases its argument in plain language: "The flaw in the order is that it requires the joint applicants to write off prudent expenditures in such a way that the utilities will never have the opportunity to recover these expenditures from rate payer."[19] WPS's due process contention is not a procedural due process objection,[20] but it contends that the Order deprives the utilities of property without compensation. In an explanation of ratemaking, WPS states: "Rather than guaranteeing a rate of return for utilities, rates set the maximum price which can be charged. If everything goes as projected in the test year, then the utility will have just an

opportunity to earn the rate of return authorized."[21] [Emphasis in the original.] From this statement, we understand that when WPS contends that it must have an opportunity to recover losses, it argues that the losses must be included in the expenses of a rate case test year used to establish rates.

WPS cites numerous cases[22] for the principle that a public service commission cannot exclude from the rate base regular, reasonable and prudent expenses incurred in the test year. Each of the cases cited is a rate case. The issue of whether an expense must be included in a rate base is distinguishable from the issue of whether the PSC properly exercised its discretion in

ordering expenses amortized over a one-year period rather than over a three- or five-year period. WPS, thus, misplaces its reliance on the authority it cites.

Both WPS and PSC cite Transcontinental Gas Pipe Line Corp. v. FPC, 518 F2d 459 (DC Cir 1975), in support of their position. In Transcontinental, the court approved a Federal Power Commission accounting order. The order permitted the recovery in rates of advance payments made by gas pipeline companies to gas producers to finance gas exploration and development. WPS argues that because the FPC permitted recovery of costs to the pipeline companies, the PSC must permit recovery of costs to the utilities in this case.

In Transcontinental, the court did not affirm the order because the order permitted recovery of costs. The recovery of pipeline costs was not at issue. Instead, the issue in Transcontinental was whether the pipeline should earn a profit on the value of the advance payments. This issue is not relevant to our case.

We agree with the PSC that the Transcontinental opinion describes the role of a reviewing court when a utility claims that a public service commission accounting order constitutes an unconstitutional confiscation of property:

> In judging in a rate proceeding whether an unconstitutional confiscation of property has occurred, the Commission and the reviewing court must compare the total rate of

> return to the value of dedicated property as a whole. ...
>
> Such a test in a rate proceeding leads to the conclusion that in an attack on individual accounting rules, the reviewing court must defer to agency expertise. ...
>
> We think the petitioner bears a heavy burden when it challenges FPC accounting regulations on the grounds that they result in an unconstitutional confiscation of property. The effect of the accounting rules should not be viewed and analyzed piecemeal, as Transco would have us do in this case. Rather, the Commission should be free to fashion individual accounting rules unless a rule ... would clearly and necessarily have the effect of rendering any rate, which is based upon the rule's use, confiscatory in the constitutional sense.[23]

Transcontinental applied the standard of review for rate orders to accounting orders. An accounting order constitutes an unconstitutional confiscation of

property if, when applied, it reduces the total rate of return to the value of the dedicated property as a whole to an unreasonable level.

WPS does not argue that its 1979 rate of return was reduced to an unreasonable level by the accounting order. Among the findings of the PSC in the Order, the PSC determined that the annual earnings per share for WPS could be reduced $.06. The PSC compared this amount to WPS's 1978 annual earnings per share of $2.54, and it concluded that the amount was insignificant. This conclusion is within the PSC's sphere of expertise, and we defer to the expertise of the PSC.[24] We conclude that the order does not constitute an unconstitutional confiscation of property.

By the Court.--Order reversed.

Not recommended for publication in the official reports.

APPENDIX

[1] The Wisconsin Supreme Court determined on a prior appeal that this order was a final order from which an appeal could be taken. Bearns v. DILHR (WPS v. PSC), 102 Wis 2d 70, 306 NW2d 22 (1981).

[2] In a prior order, the difference between $34,898,362.29 and $33,881,244.86, representing cost of land, was reclassified to an account entitled "non-utility property."

[3] The other joint applicants are Wisconsin Electric Power Company, Wisconsin Power & Light Company, and Madison Gas and Electric Company.

[4] At oral argument, this court presented to the parties the question of mootness. The parties were subsequently permitted to file supplemental briefs on this question.

[5] City of Racine v. J-T Enterprises of America, Inc., 64 Wis 2d 691, 700, 221 NW2d 869, 874 (1974).

[6] WPS cites to the court an example of such an order and includes a copy of it in its appendix. Letter from PSC to WEPCO (March 30, 1977) in which the PSC directs WEPCO to modify its accounts of January 1977.

[7] Subsequent to the March 2, 1979 Order, the PSC has ordered expenses relating to the Haven power facility amortized "starting with the completion of the next rate case by each applicant." Public Service Comm'n order of February 14, 1980 in Docket No. 05-CE-3 (Haven order).

[8] Section 196.06, Stats.

[9] Section 227.20, Stats.

[10] Other subsections of § 227.20 provide grounds for reversal or remand of administrative decisions, but the other grounds are not relevant to this appeal.

[11] Section 227.21, Stats.

[12] Seebach v. PSC, 97 Wis 2d 712, 717, 295 NW2d 753, 757 (Ct App 1980).

[13] In reaching its conclusion that the expenditures were charged to shareholders, the circuit court adopted the reasoning of WPS. WPS described its financing as having only two sources: stockholders and ratepayers. Since the

amortization in one year had the practical effect of precluding the expenditures from appearing on the utilities' books in a rate case year, the expenditures were not charged to ratepayers. The circuit court, then, was forced to accept the conclusion that the expenditures were charged to stockholders.

The same reasoning can be used to conclude that the expenditures were charged to ratepayers. For example, when the expenditures were charged to accounts, they were charged to operating accounts. Since stockholder equity is not used to pay operating expenses, the expenditures were not charged to stockholders. Therefore, the expenditures were charged to ratepayers. Since the same reasoning can produce either conclusion, the reasoning is defective.

Moreover, the reasoning creates conceptual difficulty because it appears to set rates retrospectively. Rates are only set prospectively. The PSC found that these monies were spent and were of no value to ratepayers. Yet, WPS contends that in order not to charge shareholders, future rates must permit the opportunity to recover the costs from ratepayers. If such recovery is permitted, future ratepayers pay for previously incurred costs. The ratemaking, then, is made retrospectively for those costs.

[14] The account numbers refer to accounts in the Uniform System of Accounts. The Uniform System of Accounts is an accounting system developed by the National Association of Regulatory Utility Commissioners and used by the PSC to provide a format for utility bookkeeping. Section 227.01(11)(s), Stats., exempts the PSC from promulgating the system as an administrative rule.

[15] In WPS's brief-in-chief and at oral argument, WPS stressed that the March 2, 1979 Order directed the utilities to amortize expenditures retroactively to January 1979. Counsel's stress on retroactivity implied that it is objectionable. Since WPS argues for purposes of the mootness issue that retroactive accounting orders are accepted practice, we do not consider any question relating to retroactivity.

[16] For example, WPS cites: In Re Northern States Power Co., 83 PUR3d 176, 2-U-744 (1970); In Re Bonduel Tele. Co., 87 PUR2d 107, 2-U-6986 (1970); Application of the City of Two Rivers, 42 PSCW Rep 420, 2-U-4790 (July 29, 1957). Brief for respondent, at 10-11.

[17] For example, WPS cites: PSC order, Koshkonong Docket, October 18, 1974; PSC order, Docket 05-CE-3, February 14, 1980.

[18] For example, WPS cites: Petition of Consolidated Edison of New York, Inc., Case No. 9187; Petition of New York State Elec. & Gas Co., Rate Case No. 26763; Application of Virginia Elec. & Power Co., Case No. 19960 (March 19, 1979); Application of Consumers Power Co., Case No. F-700; Application of Consumers Power Co., Case No. U-4840; 14 PUR 4th 370, 391; Application of the Detroit Edison Co., Case No. F-762; Application of San Diego Gas & Elec. Co., Decision No. 90405 (June 5, 1979). Brief for respondent, at 20-22.

[19] Brief for respondent, at 3.

[20] The requirements of procedural due process are notice and hearing. Mid-Plains Tel., Inc. v. PSC, 56 Wis 2d 780, 785-86, 202 NW2d 907, 909-10 (1973). The record shows that both requirements are well satisfied.

[21] Brief for respondent, at 6.

[22] For example, WPS cites:

> New England Telephone and Telegraph Company v. Department of Public Utilities, 121 NE2d 896 (Mass 1954); New England Telephone and Telegraph Company v. Department of Public Utilities, 275 NE2d 493 (Mass 1971); Central Maine Power Company v. Public Utilities

Commission, 136 A2d 726 (Maine 1957); New England Telephone and Telegraph Company v. Public Utilities Commission, 390 A2d 8 (Maine 1978); Boise Water Corporation v. Idaho Public Utilities Commission, 555 P1d 163 (Idaho 1976); Application of Wilmington Suburban Water Corporation, 211 A2d 602 (Del 1965); New England Telephone and Telegraph v. State, 64 A2d 9 (NH 1949); Petition of New England Telephone and Telegraph Company, 66 A2d 135 (Vt 1949); Application of Diamond State Telephone Company, 149 A2d 324 (Del 1959); Public Service Commission v. Ely Light and Power Company, 393 P2d 305 (Nev 1964). Brief for respondent, at 16.

[23] Transcontinental, 518 F2d at 465.

[24] Robertson Trans. Co. v. PSC, 39 Wis 2d 653, 657, 159 NW2d 636, 638 (1968).

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No. 83-2050

In The

Supreme Court of the United States

October Term, 1984

PACIFIC POWER & LIGHT COMPANY,

Petitioner,

vs.

PUBLIC SERVICE COMMISSION OF WYOMING,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WYOMING

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the judgment of the Wyoming Supreme Court based upon independent and adequate state grounds so as to require dismissal of the petition?

2. Has the Petitioner presented a substantial federal question in accordance with the prior decision of this Court?

3. Is a request to review the correctness of a state court's construction of a state statute within the limits of this Court's judicial power?

4. Has the Petitioner properly raised, preserved or presented a federal question?

5. Does the State of Wyoming have a legitimate state interest in protecting utility consumers?

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No. 83-2050

In The
Supreme Court of the United States
October Term, 1984

PACIFIC POWER & LIGHT COMPANY,
Petitioner,

vs.

PUBLIC SERVICE COMMISSION OF WYOMING,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WYOMING

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF THE ARGUMENT

This Court since its founding has adhered to the principle that it will not review judgments of state courts that rest upon adequate and independent state grounds. This time honored principle is based upon the limitations of the Court's own jurisdiction. *Herb v. Pitcairn,* 324 U.S. 117, 125-126 (1945). In *Pacific Power & Light Company v. Public Service Commission, Wyo.,* 677 P.2d 799 (1984) the Wyoming Supreme Court made a plain statement that its decision rested on substantive state grounds. Respondent respectfully submits that the Court is without jurisdiction and should deny the petition for writ of certiorari.

In addition, the mere presence of a federal question will not permit review, rather the federal question must be "substantial". Even though a question as to federal law has been raised, if it appears that the question is wholly formal, or is so absolutely devoid of merit as to be frivolous, or has been explicitly foreclosed by a decision of the Supreme Court so as to leave no room for real controversy, the Court will not hear the case. Wright, *The Law of Federal Courts,* Ch. 12, section 107, pp. 743-744 (4th Ed. 1983). Here the federal question raised is insubstantial and requires denial of the petition.

STATUTES INVOLVED

The result reached by the Wyoming Public Service Commission, and affirmed by the Wyoming Court was based upon state law. The Wyoming statutes mandate:

> "In conducting any investigation pursuant to the provision of this act the commission may investigate, consider and determine such matters as the cost or value, or both, *of the property and business of any public utility, used and useful for the convenience of the public,* and all matters affecting or influencing such cost or value, . . ." (Emphasis added). WYO STAT. Section 37-2-119 (1977).

In addition, WYO STAT. Section 37-2-122(a) (1977) provides:

> "In determining what are just and reasonable rates the commission may take into consideration depreciation of plant, obsolescence of equipment, *expense of operation,* physical and other values of the plant, sys-

tem, business and properties of the public utility whose rates are under consideration." (Emphasis added).

———o———

OPINION BELOW

The judgment of the Wyoming Supreme Court is *not* based upon a procedural prerequisite as argued by Petitioner, but rather has its foundation in state substantive statutory law. The Court in *Pacific Power & Light v. Public Service Commission, supra,* affirmed the decision of the Wyoming PSC prohibiting the recovery of losses associated with abandoned nuclear power projects. The issue was whether or not the investment, expenses, and obligations incurred by the utility in these projects could be included in its rate base for Wyoming operations. *Id.* 677 P.2d at 801.

The Court clearly and expressly concluded that under the statutory language of WYO. STAT. Section 37-2-119 (1977), the nuclear power projects were not successful and were only partially constructed, and therefore they could never become "property" of a "used and useful" nature. *Id.* 677 P.2d at 805. Thus, under the statute such expenditures were not properly includable in the company's rate base.

As an alternative to the "used and useful" mandate of Wyoming law, the Petitioner argues that the abandonment costs were prudent and reasonable operating expenses properly recoverable in rates. The Wyoming Supreme Court expressly concluded that "these charges were not 'operating expenses' as that term is generally con-

sidered." *Id.* 677 P.2d at 806. State substantive law again controls the determination of whether these expenditures are recoverable in ratemaking proceedings. WYO. STAT. Section 37-2-122(a) (1977).

Petitioner mistakenly argues that the lack of prior approval from the PSC is the basis for the decision below. The Court clearly indicates that this was not the case:

> "It is recognized that the foregoing statutes and rule do not require PSC approval for PP&L's part ownership of the terminated projects. . . ."

Id. 677 P.2d at 808.

The court did *recognize* the authority of the PSC to consider such expenditures as part of the "other value of the . . . system, business . . . of the public utility" under WYO. STAT. Section 37-2-122(a) (1977), if and only if the consideration is given before the investment is made or agreed to be made. *Id.* 677 P.2d at 808. However, the Court specifically concluded that it was not necessary for the company to consult the PSC prior to the investment. *Id.* 677 P.2d at 809.

ARGUMENT I

A. The Petition For Writ Of Certiorari Should Be Dismissed As The Judgment Of The Wyoming Supreme Court Is Based Upon Independent And Adequate State Grounds.

This Court has clearly indicated that its only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights, and if the judg-

ment below rests on an independent and adequate state grounds it will not hear the case. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977).

Thus there can be no review if the state court has decided the case exclusively on some ground of state law. Wright, *The Law of Federal Courts*, Ch. 12, section 107, p. 747 (1983). Review is precluded if state substantive law is sufficient to support the judgment no matter how the federal question is resolved. Wright and Miller, *Federal Practice and Procedure*, Ch. 10, section 4019, pp. 661-662 (1977).

If the state court decision is clearly and expressly based upon bona fide separate, adequate, and independent state grounds, the Court will not undertake to review the decision. *Michigan v. Long*, — U.S. —, 103 S.Ct. 3469, 77 L.Ed.2d 1201, 1214 (1983).

The undeniable conclusion is that the Wyoming Supreme Court based its judgment upon the state substantive law found in WYO. STAT. Sections 37-2-119 and 37-2-122 (a). The citations above are plain statements of the Wyoming Supreme Court's decision that statutory mandates regarding used and useful property and operating expenses form the basis of its decision. This is absolutely clear from the face of the opinion.

Further, the decision of the Wyoming Court is not based upon federal law, nor interwoven with federal law. *Mine State Bank v. Bryan*, 282 U.S. 765, 773 (1931). Federal law did not compel the decision of the Wyoming Supreme Court. The majority opinion places absolutely no reliance on federal law. This Court should respect the independence of the Wyoming Supreme Court and avoid the invitation of the Appellant to render an advisory opin-

ion on state substantive law. *Michigan v. Long,* — U.S. —, 103 S.Ct. 3469, 77 L.Ed.2d 1201, 1214 (1983).

B. Decisions Of This Court Have Rendered The Petitioner's Federal Question Insubstantial.

The Court has held that even though a question of federal law has been raised, if it appears that the question has been explicitly foreclosed by a decision of the Court so as to leave no room for controversy, the Court will not hear the case. *Ut'ey v. St. Petersburg,* 292 U.S. 106, 109 (1934); Wright, *The Law of Federal Courts,* Ch. 12, sec. 107, pp. 743-744 (4th Ed. 1983). The decisions of this Court clearly indicate that Petitioner has not raised a substantial federal question regarding the recovery of abandonment costs.

Petitioner has no right, constitutional or otherwise, to have property which is not "used and useful" included in its rate base. In *Bluefield Water Works & Improvement Company v. Public Service Commission,* 262 U.S. 679, 690 (1923), this Court stated that a utility is entitled to rates which yield a reasonable return "on the value of the *property used,* at the time it is being used to render the service." The Court has held that a company is entitled to ask a fair return upon the value of that which it employs for the public convenience. *Id.* 262 U.S. at 690.

Justice Stone in his concurring opinion in *West Ohio Gas Company v. Public Utilities Commission of Ohio,* 293 U.S. 63, 78 (1935), explained, "[T]he property for which constitutional protection is invoked is that 'used and useful in the public service' not the enlarged business of the future which petitioner hopes to obtain through the present expenditure of money." Chief Justice Stone writing

for the majority in *Federal Power Commission v. Natural Gas Pipeline Company*, 315 U.S. 575 (1942), reiterated:

> "nor does the Constitution require that the losses of the business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned."

Id. 315 U.S. at 590.

As a matter of federal law there is no constitutional right to a fair return on property not "used and useful" in serving the public. As a matter of state law the conclusion is the same. The "used and useful" principle of WYO. STAT. Section 37-2-119 is independent and there is no federal interest that requires a different result.

In *Denver Union Stock Yard Co. v. United States*, 304 U.S. 470, 475 (1938) the Court said:

> "As of right, safeguarded by the due process clause of the Fifth Amendment, appellant is entitled to rates, not per se excessive and extortionate, sufficient to yield a reasonable rate of return upon the value of property used, to render services. [Citations omitted]. *But it is not entitled to have included any property not used and useful for that purpose.* (Emphasis added).

Id. 304 U.S. at 475.

The decisions of this Court explicitly foreclose Petitioner's federal question and leave no room for real controversy. Petitioner should not be allowed to circumvent the clear pronouncements of this Court, by merely claiming that the same expenditures are "operating expenses."

Petitioner has no federal or state constitutional right to treat capital investments and losses in abandoned nu-

clear power projects, as if they were "operating expenses." In general, losses which are incurred in the operation of an unprofitable division or aspect of a utility's business may not be passed along to other customers as part of the cost of service. Priest, *Principles of Public Utility Regulation,* Vol. I, Ch. 3 p. 65 (1969). WYO. STAT. Section 37-2-122(a) provides that the Public Service Commission may consider the "expense of operation". However, the statute does not allow transfiguration of extraordinary loss sustained in connection with terminated nuclear power plants into ordinary operation expense. *Office of Consumers' Council v. Public Utilities Commission,* 67 Ohio St. 3d 153, 423 N.E.2d 820, 827 (1981). The Ohio Court in two subsequent cases found that the disallowance of cancelled plant costs did not constitute confiscation of private property without due process. *Cleveland Electric Illuminating Co. v. Public Utility Commission,* 4 Ohio St. 3d 107, 447 N.E.2d 746 (1983); App. dismissed for want of substantial federal question. — U.S. —, 104 S.Ct. 47, 78 L.Ed.2d 68 (1983). *Dayton Power & Light Co. v. Public Utilities Commission,* 4 Ohio St. 3d 90, 447 N.E.2d 733 (1983).

Petitioner has not presented a substantial federal question and the state law grounds are independent and adequate. The petition should be denied for lack of substantial.federal question.

ARGUMENT II

A. Petitioner's Challenge To The Correctness Of The Wyoming Supreme Court's Construction Of A State Statute Does Not Confer Jurisdiction On This Court.

The Petitioner contends that the Wyoming Supreme Court has created a procedural requirement that is unsupported by state law. The Wyoming court did construe state law to allow consideration of abandonment costs in the ratemaking formula, if presented prior to investment. However, this is NOT the basis of the Court's decision and does not create a mandatory procedural hurdle for the Petitioner. The court specifically notes that it was not necessary for the company to consult the PSC prior to the investment, and that the statutes do not require PSC approval for PP&L's part ownership in the terminated projects. *Pacific Power & Light v. PSC, supra,* 677 P.2d at 808-809. The court merely concludes that the PSC could have *considered* these expenditures if the company had sought consideration prior to the investment. Since the company had not sought such consideration, the PSC as the protector of the public interest had no authority to consider such expenditures in the ratemaking formula. Again, the court is merely interpreting the permissible scope of the PSC's review under state law, and the Petitioner is requesting this Court to render an advisory opinion upon the propriety of the Wyoming Supreme Court's interpretation of state substantive law. Even if the interpretation is erroneous, this Court does not have jurisdiction to hear the case.

It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. *American Railway Express Company v. Kentucky,* 273 U.S. 269, 273 (1927). In *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.,* 243 U.S. 157 (1917) the Court said:

> "The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law."

Id. 243 U.S. at 165-166.

The courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state, and the mere fact that the state court may have rendered an erroneous decision on a question of state law does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 680 (1930).

It is irrelevant whether this Court would construe the statute in the same way as the Wyoming Supreme Court. *Great Northern Railway Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 362 (1932). This Court must accept the construction given to a state statute by the highest court of the State. It is not the function of the Court to construe a state statute contrary to the construction given it by the highest court of a State. *O'Brien v. Skinner,* 414 U.S. 524, 531 (1974). Stated another way, the Supreme Court must accept the construction given to a state statute by the highest court of the State.

A request for an opinion in the nature of advice concerning legislative action is not within the limits of this Court's judicial power of deciding cases and controversies. *Muskrat v. United States,* 219 U.S. 346, 362 (1911).

Here, the Petitioner has again failed to present a substantial federal question and the petition should be

denied. Petitioner's attack upon the state court construction of the statute does not confer jurisdiction on this Court.

B. The Court Should Dismiss The Petition For Want Of A Properly Presented Federal Question.

The Petitioner argues that the interpretation of WYO. STAT. Section 37-2-122(a) allowing prior consideration of abandonment costs could not have been anticipated prior to the Wyoming Supreme Court decision. Nevertheless, Petitioner failed to raise the federal questions, now argued, at the first opportunity. Petitioner's application for rehearing fails to assert that the construction of the statute violates its constitutional rights. (See Appendix to Respondent's Brief) In effect, the first time Petitioner raises the constitutional argument is in the petition for writ of certiorari.

It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the state. *Missouri ex. rel. Missouri Ins. Co. v. Gehner,* 281 U.S. 313, 320 (1930). The federal question now argued, has never been raised, preserved, or passed upon in the state courts below. The Court has consistently refused to decide federal constitutional issues raised for the first time in the petition for writ of certiorari. *Webb v. Webb,* 451 U.S. 493, 498-499 (1981). Petitioner's federal questions were not raised prior to the petition for certiorari and the Court should not consider them. *Helvering v. Minnesota Tea Co.,* 296 U.S. 378, 380 (1935). The federal questions should have been raised in the application for rehearing to the Wyoming Supreme Court. *Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra,* 281 U.S. at 680. The Court should

dismiss the petition for want of a properly presented federal question.

ARGUMENT III

The State Of Wyoming Has A Legitimate State Interest In Protecting Utility Consumers.

The regulation of public utilities has been characterized by this Court as "one of the most important functions traditionally associated with the police power of the States." *Arkansas Electric Corp. v. Arkansas Public Service Commission,* — U.S. —, 103 S.Ct. 1905, 1908, 76 L.Ed.2d 1, 6 (1983).

WYO STAT. Section 37-2-112 (1977) provides that the Wyoming Public Service Commission "shall have general and exclusive power to regulate and supervise every public utility within the state in accordance with the provisions of this act." Thus, the PSC is delegated the authority to regulate utilities in accordance with the Wyoming public utility statutes. The statutes dictate the permissible scope of the PSC's regulation. Pursuant to the statutorily mandated guidelines for ratemaking in Wyoming, the legislature has declared and the court has construed, that consumers may not be charged for investments or expenditures which are neither used and useful for Wyoming service, nor properly categorized as operating expenses.

The State of Wyoming has a legitimate state interest in providing that the public pay to a public utility no more than the services rendered to it are reasonably worth. The primary mission of the regulatory body is to pro-

tect consumers, while at the same time striving to reach a balance between consumers, producers, and those whose interests fall in between. *Public Service Commission for the State of New York v. Federal Power Commission,* 467 F.2d 361 (D.C. Cir. 1972). As a surrogate for competition, regulation does not become an insurance policy against harsh results. The hazard that property will not earn a profit remains on the company in the case of regulated, as well as unregulated business. *Federal Power Commission v. Natural Gas Pipeline Company, supra,* 315 U.S. at 590.

In *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968) the Court clearly indicated:

> "Regulation may, consistently with the Constitution, limit stringently the return recovered on investment, for investors' interests provide only one of the variables on the constitutional calculus of reasonableness."

Id. 390 U.S. at 769.

It is reasonable for the State of Wyoming to limit the demands of public utilities upon the pockets of its patrons. The substance of state law has been construed by the Wyoming Supreme Court to appropriately limit PP&L's demand that losses be restored by ratepayers. Current ratepayers should bear only legitimate costs of providing service to them. This Court should respect the independence of the state court and refuse to render an advisory opinion upon state law.

———o———

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT, STATE OF WYOMING

No. 83-75

PACIFIC POWER & LIGHT COMPANY,
a corporation,

Appellant
(Petitioner),

v.

THE PUBLIC SERVICE COMMISSION
OF WYOMING,

Appellee
(Respondent).

PACIFIC POWER & LIGHT COMPANY'S APPLICATION FOR REHEARING

(Filed March 5, 1984)

Pacific Power & Light Company, Appellant, respectfully requests that the Wyoming Supreme Court grant this Application for Rehearing for the following reasons and without waiving any arguments it previously presented for the Court's consideration:

1. The Court erred in finding a statutory restriction that the Commission can only consider an investment "in a potential product producing project * * * as a part of the 'other values of the system, business * * * of the public utility' * * * if the consideration, and only if the consideration is given before the investment is made or agreed to be made."

2. The Court erred in judicially establishing a restriction on the Commission's power to consider an invest-

ment in a product producing project "as a part of the 'other values of the system, business * * * of the public utility' * * * only if the consideration is given before the investment is made or agreed to be made."

3. The Court erred in finding the Commission "was not consulted prior to the investment" in the two projects at issue.

DATED: March 2, 1984.

Respectfully submitted,

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IN THE SUPREME COURT, STATE OF WYOMING

No. 83-75

PACIFIC POWER & LIGHT COMPANY,
a corporation,

Appellant
(Petitioner),

v.

THE PUBLIC SERVICE COMMISSION
OF WYOMING,

Appellee
(Respondent).

PACIFIC POWER & LIGHT COMPANY'S BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

By the accompanying application, Pacific Power & Light Company ("Pacific") requests a rehearing in this matter. Such a rehearing is particularly important in this case because the primary basis for the majority's opinion was neither presented for argument nor argued by any of the parties in their briefs or in oral argument before the Court. The Court has previously stated that questions not raised or asserted at the trial level are not properly before the Supreme Court unless the question is one of jurisdiction or fundamental rights. *Valentine v. Ormsbee Exploration Corp.*, 665 P2d 452 (Wyo 1983); *U. S. Aviation, Inc. v. Wyoming Avionics, Inc.*, 664 P2d 121 (Wyo 1983); *Matter of Parental Rights of PP*, 648 P2d 512 (Wyo 1982). Similarly, the United States Supreme Court stated:

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may,

> of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings. *United States v. Atkinson,* 297 US 157, 56 S Ct 391 (1936).

The Court's ground for decision in this case does not fall under any of these exceptions. Thus, for example, the basis of the decision is neither an issue of the Court's jurisdiction nor an issue of protection of a fundamental right, such as in criminal cases where the defendant's liberty is at stake. The general rule should not be lightly abandoned where it promotes both the orderly processing of cases through the judicial system and procedural fairness for all litigants before the courts.

If the Court chooses to fashion another rule for review in this case, justice and equity would be well served if all parties are now given the opportunity to address the new issues raised by the Court, where, as here, the decision has such far-reaching implications for the future regulation of utilities in Wyoming. To that end, Pacific respectfully submits the following argument for the Court's consideration:

I. In Setting Just and Reasonable Rates, The Existing Statutory Scheme Allows The Commission To Consider An Investment In A Product Producing Project As A Value Of The Business Of The Public Utility Even If The Consideration Of The Investment Is Given After The Investment Is Made Or Agreed To Be Made.

As succinctly stated in Justice Rose's concurring opinion, "the PSC possesses only that power and authority granted to it by the Wyoming Constitution and statutes. The enabling statutes must be strictly construed and any

reasonable doubt as to the existence of any power must be resolved against its exercise." Concurrence at 1. Further, this Court has previously found that in determining what specific words in a statute mean, the entire enactment must be referred to in consideration of the context in which the words are used. *Saffels v. Bennett*, 630 P2d 505 (Wyo 1981).

When the entire enactment is reviewed and considered here, it is apparent that the Legislature explicitly provided procedures for specific approvals from the Public Service Commission ("Commission") where it intended to require them, as well as stated the consequences of noncompliance. The Legislature could easily have explicitly stated the prerequisite found by the majority here, but it did not do so. The conclusion is that no such prerequisite was intended.

Thus, the Legislature stated in § 37-2-205:

> No public utility shall begin construction of a line, plant or system or of any extension of a line, plant or system without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction. * * *
>
> * * *
>
> * * * The commission shall have the power, after hearing involving the financial ability and good faith of the applicant and the necessity of additional service in the community, to issue said certificate, as prayed for, or to refuse to issue the same.[1]

Similarly, the Legislature has stated that a public utility may issue stocks, stock certificates and certain

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[1]Section 37-2-205 does not apply to the projects at issue here because they were not located in Wyoming.

other securities "when authorized by order of the commission and not otherwise" and only for certain enumerated purposes, including "the construction, completion extension or improvement of its facilities." Wyo Stat § 37-6-101. The Commission must approve the issuance unless it finds "that such transactions are inconsistent with the public interest; or that the purpose or purposes thereof are not permitted by this act; or that the aggregate amount of the securities outstanding and proposed to be outstanding would exceed the fair value of the properties and business of the public utility." Wyo Stat § 37-6-102.

In spite of the Legislature's explicit requirement of prior approval in other circumstances and the absence of any such explicit requirement in the present circumstance, the majority finds that:

> if the utility wishes to involve the consumer in a loss or cost resulting from failure of [a product producing] project, i.e., if it wishes to have such cost or loss considered in subsequent rates, PSC's prior approval, is necessary. Slip Opinion at 15.

The only statutory support given by the Court for requiring such advance approval is § 37-2-122(a) which provides:

> In determining what are just and reasonable rates *the commission may take into consideration* depreciation of plant, obsolence of equipment, expense of operation, physical and *other values of the* plant, *system, business and properties* of the public utility whose rates are under consideration. (Emphasis added.)

The requirement of advance approval apparently derives from the Court's definition of the word "values." In a footnote, the majority states "PP&L's project had a book value as part of its system or business when the invest-

ment was made. After it failed, it had no value at all." Slip Opinion at 15.

The majority's finding goes beyond the interpretation of the statutory scheme created by the Legislature and creates a new procedural requirement with great substantive repercussions. Here the effective loss for noncompliance is the Wyoming allocated share of Pacific's direct investment of $182,103,000 (Ex. 7, Tables 7-1, 7-2). It is almost inconceivable that the Legislature intended such a loss to result solely as a result of a *procedural deficiency* without explicitly stating the procedural requirement. "If that was the intention of the legislature, it should have made that known in more appropriate and plainer language than that contained in our statute." *Town of Clearmont v. State H'wy Comm'n,* 357 P2d 470, 476 (Wyo 1960).

That this requirement is a creation of the majority and not of the Legislature is supported by a review of the Commission's previous actions. The Commission is charged with enforcing the provisions of Title 37 of the Wyoming Statutes. Wyo Stat § 37-2-112. Its previous actions in interpreting the provisions it is charged with administering is persuasive evidence of the intent behind the statutes. Thus, "courts have regarded administrative interpretations and applications of statutes, particularly those which govern agency operations, as persuasive, and have accorded them respect, deference, and consideration." 73A CJS Pub Admin L & Proc § 248.

At no time during the course of the present proceeding have the attorneys representing the Commission or the Commissioners themselves asserted any such require-

ment as the Court now asserts exists within the Wyoming statutory framework. Further, as was pointed out in Pacific's opening brief, the Commission has implicitly recognized these costs as legitimate costs by its allowance of recovery of Pacific's costs related to the High Mountain Sheep project. Brief of Appellant Pacific Power & Light Company at 13. No prior approval was asserted or required in that case.

In conclusion, the Legislature explicitly provided advance approval from the Commission where it intended it to be required. No such explicit requirement exists in the statutes such as the Court now finds. The existence of such a requirement has never been urged or suggested by the Commission, the agency charged with the enforcement of the statutes. The Court should find on rehearing that prior approval from the Commission is not a statutory prerequisite to any and all recovery of Pacific's investment.

II. The Legislature Is The Proper Forum For Establishing Procedural Prerequisites To Rate Recovery.

"This court has long recognized that it must not usurp or encroach upon the legislative function." *Kennedy v. State*, 559 P2d 1014, 1017 (Wyo 1977). The source of the restriction is the Wyoming Constitution, Article II § 1:

> The powers of the government of this state are divided into three distinct departments: The legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as this constitution expressly directed or permitted.

Thus, this Court has repeatedly stated that "Courts will not enlarge, extend, expand or stretch a statute to matters not falling within its express provisions." *Stevens v. Rock Springs Nat'l Bank*, 577 P2d 1374, 1378 (Wyo 1978). *Bd. of Co. Comm'rs of Campbell Co. v. Ridenour*, 623 P2d 1174 (Wyo 1981); *Lo Sasso v. Braun*, 386 P2d 630 (Wyo 1963). *See also, Croxton v. Bd. of Co. Comm'rs of Natrona Co.*, 644 P2d 780 (Wyo 1982); *Ramsour v. Grange Ins. Ass'n*, 541 P2d 35 (Wyo 1975); *Snell v. Ruppert*, 541 P2d 1042 (Wyo 1975); *Parsons v. Roussalis*, 488 P2d 1050 (Wyo 1971).

> Finally, as a matter of general statutory construction, the rule is that, in construing a legislative enactment, we are bound by the language found within its four corners and we are not at liberty to insert language, words or provisions that do not there appear. *Matter of Johner*, 643 P2d 932, 934 (Wyo 1982).

Policy reasons against such judicial legislation become apparent on reviewing the procedure proposed by the majority in this case. What is left unsaid is as significant as that which is said. The point can probably best be made by comparing the Court's direction with the Legislature's direction with regard to granting certificates of public convenience and necessity.

The majority of the Court states that "Only PSC is properly in a position to be concerned with the consumer interest in consideration of the propriety of the risk activity and to balance the interests of the consumer and the utility." Slip Opinion at 12. Succinctly put, the Court required standard seems to be one of "public interest" quite similar to the statutory requirement in § 37-2-205 that the Commission find that "the present or future public convenience and necessity require or will re-

quire such construction." With respect to the granting of certificates of public convenience and necessity, it is established that the public interest is to be given paramount consideration. *Matter of Rule Radiophone Serv., Inc.*, 621 P2d 241 (Wyo 1980); *Bull Horn Rural Elec. Co. v. Pacific Power & Light Co.*, 397 P2d 455 (Wyo 1964).

Attached as Appendix A is a recent order of the Commission granting a certificate of public convenience and necessity. It demonstrates the types of issues considered by the Commission in allowing construction to go forward, such as the applicant's financial ability to develop the project and the need for the resulting power to satisfy growing consumer load requirements. It would seem likely the same evaluations would need to be made here.[2] However, Appendix A demonstrates that no rate-making issues are addressed in the proceeding for a certificate of public convenience and necessity. Nevertheless, because of the remarkable similarity in the public interest standards in the two situations, the question is raised whether prior receipt of such a certificate from the Commission, with its necessary finding that public convenience and necessity require construction, would be sufficient to dispel the Court's concern with regard to rate recovery for investments in terminated projects.

The Court states that the Commission's consideration must be given "before the investment is made or

---

[2]The remarkable similarity of context and standards to be applied between this situation and the statutory requirement for a certificate of public convenience and necessity lends support to the argument that the Legislature did not intend the expansion of the latter requirement into the former circumstances.

agreed to be made." Slip Opinion at 15. Pacific submits this would be a very difficult standard to meet and would severely limit the Commission's review of any proposed project. Clearly, the utility must make some investment in a project before approval could possibly be sought simply to have sufficient information to respond to legitimate questions on behalf of the Commission. In the case of nuclear plants, this investment can be substantial. For example, millions of dollars could be required for engineering and environmental studies before an application for approval of a major generating project could be prepared and supported before the Commission. Of necessity, the earlier the required review, the less information is available to the Commission in making its decision. The later the request for approval, the more information available to the Commission. By comparison, the statute governing certificates of public convenience and necessity simply requires approval before a utility "shall begin construction." Wyo Stat § 37-2-205. This standard allows more information to be made available to the decisionmaker than the standard now proposed by the Court. A pre-construction, instead of a pre-investment, approval standard would also allow the approval process to be less disruptive of the development of the project and, therefore, less costly to the project because review and development could occur simultaneously as long as approval preceded the actual construction phase.[3] This is particularly true because of the requirements of § 37-2-120 and the Court-envisioned ratemaking consequences of the Commission's approval. The Court states:

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[3]It should be noted that the Pebble Springs project was terminated before construction was begun.

> The requirement for prior approval of the PSC is necessary so that the risk attributable to the consumers can be evaluated and be either rejected or accepted—or, perhaps, the proportion of the risks to be borne by the consumers, if unsuccessful, can be set. The conversion computations to a used and useful property, if successful, and the period of amortization, if unsuccessful and such becomes necessary, can be predetermined. The percentage of the investment attributable to the Wyoming operation can be ascertained. Slip Opinion at 15.

Section 27-2-120 states:

> No order, however, shall be made by the commission which requires the change of any rate or service, facility or service regulation except as otherwise specifically provided, *unless or until a public hearing has been held* in accordance with the provisions of this act. (Emphasis added.)

Because of the ratemaking consequences, other parties can be expected to intervene in the required public hearing as occurs in general rate cases. If no investment can be made or agreed to be made until the approval process is complete, including any court appeals, many projects will fail simply because of the delay. Those that do not fail may be significantly more expensive. Just the inflation increase in a one or two year time span can be significant for a major project. This cost will become a necessary additional cost to every project ultimately developed, to the consumers' detriment.

Pacific believes it important for the Court to realize that these concerns are not simply academic. The Court offers a rule with respect to investments in "potential product producing project[s]." Slip Opinion at 15. Presumably, any investment Pacific might make in various alternate resource generation projects would be covered

by the Court's ruling. It is unclear whether investments in conservation programs could or would be considered "potential product producing project[s]." Finally, there is no statutory basis for distinguishing between generation projects and projects for new transmission or distribution lines.[4] Major transmission lines, which become rate base items on completion, are expensive to design, engineer and construct. They can face substantial opposition in the permitting and licensing phase. If termination results prior to operation, would recovery of previous prudent investments in the project be denied absent pre-investment approval from the Commission? Under the Court's ruling, the conservative corporate action would be to submit all of them to the Commission for advance approval, triggering a potentially protracted public hearing proceeding on issues which will become important only if the project is later terminated.

Pacific submits that not only are manifold difficulties and complexities introduced into the regulatory arena by the Court's decision, the protection of the consumer with which the Court is concerned already exists in the statutory framework. The Court expressed its concern as follows:

> If PP&L gauged the risk with the intention that the loss would be borne by the consumers, there would be no risk at all for PP&L (the stockholders). This fact might encourage PP&L to venture into activities having a very small chance of economic success with the knowledge of no loss to it should the activity fail

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[4]Indeed, the statutes governing certificates of public convenience and necessity make no such distinction, but refer to "construction of a line, plant or system, or of any extension of a line, plant or system." Wyo Stat § 37-2-205.

> and of great gain should the small chance of success occur.
>
> If the consumers are to take the risk, it would seem that they should have some say as to whether or not the projects are to be undertaken. Only PSC is properly in a position to be concerned with the consumer interest in consideration of the propriety of the risk activity and to balance the interests of the consumer and the utility. Slip Opinion at 12.

In the context of the present case, reversing the Commission as a matter of law is not tantamount to shifting the risk of terminated projects to the consumers, nor would it automatically require an increase in rates to the consumers. Rather, it would require the Commission to address the reasonableness of Pacific's actions nunc pro tunc. Thus far, the Commission has refused to address this issue:

> The utilities contend that if they were prudent they should be permitted to recover from ratepayers their investment and related financial obligations. We have indicated why we believe that application of the used and useful principle is required and appropriate. *Application of this principle makes it unnecessary to decide whether or not these utilities were prudent in their decision making, participation, and management* of these cancelled power plant projects. *Pacific Power & Light Co.*, Dkt 9454 Sub 17 (Wyo PSC Dec. 2, 1982). (Emphasis added.)

Under existing law, the Commission is not required to make any ratemaking decision affecting the consumer until the utility requests that rates actually be put into effect. At that time complete information is available to the Commission, *i.e.*, either when a plant becomes operational or when it is abandoned. Thus, where a terminated project is involved, when all the information is in, the Com-

mission is charged with reviewing the prudence of the utility's decision to construct the project, with prudence to be determined as of the time the decision to construct was made. This offers the same protection to the consumer that the Court's procedure affords. In fairness to the utility, it is not precluded from recovering investments found to have been prudently made just because it failed to seek prior Commission approval, not provided for by the governing statutes.

The confusion created by the Court's action in this case is obvious and unnecessary. Resolving these issues, should the Court let its opinion stand, will be costly and time consuming for all concerned: the Commission, the utilities, potentially the Legislature and, most important, the electric consumers and taxpayers of Wyoming. On rehearing, the existing statutory framework should supply the basis of decision.

III. If Approval Was Required, It Was Received When The Commission Approved As In the Public Interest The Financing Necessary For the Construction Program Of Which These Projects Were An Integral Part.

The Court's opinion references the Commission's allowance of amortization of Pacific's investment in the High Mountain Sheep project. It then states, "Usually the activity which subsequently failed was approved as an activity prior to its inception by the PSC or it consisted of property with a used and useful history." Slip Opinion at 15. It is unclear whether the Court believed Pacific to have received approval from the Commission for the High Mountain Sheep project, which project never

became operational. If so, the only place the Court could find such approval is in the application of §§ 37-6-101 and 37-6-102. Similar approval was received from the Commission with regard to the projects at issue here.

Section 37-6-101 requires Pacific to get advance approval from the Commission before issuing certain securities. The securities can be issued only for statutorily enumerated purposes and the Commission must find that the proceeds will be used for those purposes and that such transactions are in the public interest.

To support its ongoing construction program, Pacific came before the Commission for approval under these provisions in each and every year these projects were being developed. *Pacific Power & Light Co.*, Docket 9266 Subs 42, 43, 45, 47, 50, 53, 54, 55, 56, 57, 63, 64, 65, 70, 71, 72, 74, 75 and 78 (Wyo PSC 1973-81). A typical order from this period is attached as Appendix B. Paragraphs 8 and 9 are of particular interest. They state:

> 8. Applicant proposes to apply the net proceeds from the issuance and sale of the Common Stock for construction improvement and expansion of its electric facilities. Construction expenditures for 1977-78 are presently estimated at $602,141,000.* * *
>
> 9. The proposed issuance of the securities herein will be for lawful objects within the corporate purposes of PP&L and compatible with the public interest; the objects are necessary, appropriate and consistent with the proper performance by applicant of service as a public utility and will not impair its ability to perform that service.

If, as the Court has stated, a utility must consult the Commission with regard to generation projects under construction in order to have the investments considered in

later rate proceedings, Pacific submits that the Commission's consistent findings that Pacific's financings to construct these projects were in the public interest is sufficient approval such that the Commission must now consider these investments in the setting of just and reasonable rates.

For all of the above stated reasons, Pacific respectfully requests rehearing in this matter.

DATED: March 2, 1984.

Respectfully submitted,

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CASE NO. 83-2050

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PACIFIC POWER & LIGHT COMPANY
PETITIONER,

V.

PUBLIC SERVICE COMMISSION OF WYOMING,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE WYOMING
SUPREME COURT

==========

REPLY BRIEF

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QUESTIONS PRESENTED

1. Is state regulation of utilities subject to constitutional limitations?

2. Have previous decisions of this Court rendered Petitioner's federal question insubstantial?

3. Are there independent and adequate state grounds in support of the Wyoming Supreme Court judgment?

4. Has Petitioner properly preserved and presented a federal question?

PARTIES

On June 15, 1984, after the Petition For Writ Of Certiorari was filed, Petitioner, Pacific Power & Light Company, changed its corporate name to PacifiCorp. For the purpose of its Wyoming electric operations, PacifiCorp does business under the assumed business name Pacific Power & Light Company. In addition, after the Petition For Writ Of

Certiorari was filed, Petitioner obtained an ownership interest in several additional subsidiaries.[1]

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[1] Petitioner PacifiCorp is a Maine corporation and owns portions of the following subsidiaries and affiliates: Northwest Energy Sevices Co., NORNEV Demonstration Geothermal Co. and Pacific Northwest Power Co.

In addition Petitioner has two wholly owned subsidiaries, Pacific Telecom, Inc. and NERCO, Inc., which in turn own portions of the following subsidiaries and affiliates:

Pacific Telecom, Inc.

Associated P&C Engineers, Inc.; AT&E Corp.; Cid Communiciones, Limitada; Comdial Corp.; Constant Communications Company; Evotek; Exo Systems Corporation; Eyedentify, Inc.; Flight Dynamics, Inc.; Interior Telephone Co.; MicroRIM, Inc.; Multivisions, Inc.; NorCom Construction, Inc.; Pacific TelCom Construction Co.; Proactive Systems, Inc.; Ron Morris Corporation; Sertel, Inc.; STU Partnership; and Telcom Construction Co.

NERCO, Inc.

ACT Group; AKRG Joint Venture; Alligator Ridge Joint Venture; Bald Mountain Join Venture; Bridger Coal Company; Clements Energy Associates; Clements Energy 1979-I; Clements Energy

(Footnote continued)

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(Footnote 1 continued from previous page) 1979-II; Clements Energy 1980; Clements Energy 1981; Clements Energy 1982-I; Clements Energy 1982-II; Decker Coal Company; Ketchum Creek Joint Venture; Montana Royalty Company, Ltd.; Rampart Joint Venture; Royal Mountain King Joint Venture; Ruby Joint Venture; Taylor Joint Venture; Teton Nuclear Exploration; Unga Joint Venture; and Victor Joint Venture.

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STATE REGULATION OF UTILITIES IS SUBJECT TO FEDERAL CONSTITUTIONAL LIMITATIONS

Although Respondent agrees that a regulatory commission is charged with reaching a balance between consumers and producers of utility service, it does not discuss whether Respondent's opinion and the Wyoming Supreme Court decision analyzed the balance of these interests, as previously required by this Court.

Petitioner agrees that Wyoming has a legitimate and substantial interest in protecting utility customers. However, a state cannot, under the guise of protecting customers, fail to consider the legitimate interests of utility investors. For example, a state could "protect" customers, by requiring that a utility provide service at no charge. Such conduct would not consider the interests of investors and would confiscate their property without just

compensation or due process of law. Although the above example is an extreme situation, it makes clear that this Court should not defer to all decisions of state regulatory commissions and state court review of such decisions.

This Court has reviewed and overturned state court decisions when the utility demonstrated the commission had failed fairly to balance the interests of consumers and investors and that such result had produced confiscation. Respondent's decision and the Wyoming Supreme Court opinion made no effort to balance the competing interests. In addition, the uncontradicted evidence presented to Respondent established that Respondent's denial of compensation reduced Petitioner's return on its total investment to 2.5 percent and provided no return on its common equity. (Tr. 883-84.) This action is clearly confiscatory

in view of the previous decisions of this Court. For example, in West Ohio Gas Co. v. Public Utilities Comm'n, 294 U.S. 63, 78, 55 S.Ct. 316, 79 L.Ed. 761 (1935), and in Bluefield Waterworks & Improvement Co. v. Public Service Comm'n of West Virginia, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923), this Court found that returns of 4.28 percent and 6 percent, respectively, were too low to satisfy constitutional requirements.

This Court should exercise its authority to consider whether the above result of the state regulation violates Petitioner's constitutional rights.

PREVIOUS DECISIONS OF THIS COURT HAVE NOT RENDERED PETITIONER'S FEDERAL QUESTION INSUBSTANTIAL

Respondent contends Petitioner's federal question is insubstantial because (1) it has no right to have property included in its rate base which is not "used and useful"; and

(2) disallowance of cancelled plant costs as an operating expense does not constitute confiscation of private property. The decisions cited do not support Respondent's contention.

Decisions of this Court establish the limited proposition that a utility may not receive a return on property that is not used. Petitioner does not request that it be allowed a return on the investment in the abandoned facilities. Rather, Petitioner contends that unless it receives an opportunity to recover these expenditures, the allowed and actually achieved return on its facilities that are used and useful will be reduced to a confiscatory level.

Respondent states that the Ohio Court twice found that disallowance of cancelled plant costs did not constitute confiscation. The Ohio cases are distinguishable. In Cleveland Electric

Illuminating Co. v. Office of Consumer's Counsel, 4 Ohio St. 3d 107, 447 N.E.2d 746 (1983), App. dismissed for want of substantial federal question, ____ U.S. ____, 104 S.Ct. 47, 78 L.Ed.2d 68 (1983), the Ohio Supreme Court found that to establish confiscation, under the Constitution, the utility must demonstrate that the rate order falls outside the broad zone of reasonableness, but had failed to do so. (447 N.E.2d at 748.) Similarly, in Dayton Power & Light Co. v. Public Utilities Comm'n, 4 Ohio St. 3d 90, 447 N.E.2d 733 (1983), the Ohio Supreme Court found that although a utility may theoretically be able to establish confiscation in violation of the Constitution, the utility had failed to show that the Commission's order, viewed in its entirety, produced an unjust, unreasonable, and, therefore, confiscatory result. (447 N.E.2d at 744-45.)

Petitioner here has shown that Respondent's order clearly produces an unjust, unreasonable and confiscatory result. In sum, Petitioner has presented a substantial federal question for review by this Court.

THERE ARE NO INDEPENDENT AND ADEQUATE STATE GROUNDS SUPPORTING THE WYOMING SUPREME COURT JUDGMENT

Respondent's discussion of the basis of the Wyoming Supreme Court's decision is confused, if not misleading. Respondent first states the decision below is not based on Petitioner's failure to seek prior approval from the Respondent. Respondent then asserts the Wyoming statutes as to used and useful property and operating expenses formed the basis of the Wyoming Supreme Court decision. This statement is contradicted by Respondent's later statement that because Petitioner had not sought prior approval of the expenditures, Respondent

had no authority to consider such expenditures. In either event, the end result of the Wyoming Supreme Court's application of state law is confiscation of Petitioner's property.

Petitioner does not seek to have this Court review construction of Wyoming law by the Wyoming Supreme Court. Petitioner does, however, seek to have this Court determine if the application of Wyoming law to Petitioner results in confiscation of Petitioner's property. Respondent correctly asserts that the majority opinion of the Wyoming Supreme Court places no reliance on federal law. To the contrary, despite Petitioner's clearly presented claims that the result imposed by the Respondent on the basis of the Wyoming statutes violated Petitioner's constitutional rights, the

Wyoming Supreme Court ignored such claims. Finally, the procedural prerequisite of seeking prior approval created by three of the five Wyoming Supreme Court justices cannot reasonably be applied retroactively to deprive Petitioner of its constitutional rights.

PETITIONER PROPERLY PRESENTED A FEDERAL QUESTION

The petition establishes that a federal question was clearly and repeatedly presented to both Respondent and the Wyoming Supreme Court. Despite the clear and consistent presentation of a federal question by Petitioner, neither the Court nor Respondent acknowledged or discussed these important claims. Despite this history, which Respondent ignores, Respondent contends that the Petition should be dismissed because Petitioner's rehearing application did not reassert the federal question. To the contrary,

Petitioner's rehearing application specifically advised the Wyoming Supreme Court that it was not waiving any arguments that it previously presented for the Court's consideration. These arguments clearly included Petitioner's federal question claims. Respondent and the Wyoming Supreme Court were at all times aware of Petitioner's federal question claims. Requiring that such claims be restated would have served no useful purpose.

CONCLUSION

Petitioner respectfully requests that the Court grant its Petition For Writ Of Certiorari.

Respectfully submitted,

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